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TORT REFORM IN MISSISSIPPI: AN APPRAISAL OF THE NEW LAW OF PRODUCTS LIABILITY, PART II*

Phillip L. McIntosh**

I. INTRODUCTION

In 1993, the Mississippi legislature enacted the Mississippi Products Liability Act [hereinafter the Act], the substantive portions of which became effective on July 1, 1994.¹ *Part I* of this Article, previously published,² discussed the purpose of the new Act; the definitions of basic terms of art used in the Act — such as “product,”³ including whether used products are covered by the Act,⁴ “manufacturer,” “seller,” and “unreasonably dangerous”; and the interests protected by the Act. *Part II* of this article addresses the categories of defects forming the bases of claims for damages created by the Act, the liability of sellers and manufacturers, defenses to products liability claims available under the Act, and indemnity claims.

As noted in *Part I*, the purpose of the Act was to bring predictability, stability, and fairness to the law of products liability in Mississippi.⁵ *Part I* concluded that much of this purpose is lost in the ambiguity of the Act, partly as a result of the lack of definitions and partly as a result of a lack of clear expression of the coverage and intent of the Act.⁶ *Part II* further demonstrates some of the weaknesses of the Act as adopted while analyzing how it both retains some common law concepts as developed in Mississippi and changes others. A careful analysis of the Act shows an urgent need for the legislature to again take up the subject of products liability and to address the gaps, vagueness, and confusion created by the Act in its current form.

* PART I of this Article appears in Volume 16, No. 2, of the MISSISSIPPI COLLEGE LAW REVIEW.

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1. Act of Feb. 18, 1993, H.B. 1270, 1993 Miss. Laws ch. 302 (codified at MISS. CODE ANN. § 11-1-63 (Supp. 1996)) [hereinafter the Act].

2. Phillip L. McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability*, PART I, 16 MISS. C. L. REV. 393 (1996) [hereinafter PART I].

3. *Id.* at 400-10. Since the completion of PART I, the Mississippi Supreme Court in *McIntyre v. Farrel Corp.*, 680 So. 2d 858, 865 (1996), has held, in answering a question certified to it by the Fifth Circuit, that MISS. CODE ANN. § 15-1-41 (1972) (a statute of repose for claims dealing with improvements to real property) was not designed to protect equipment manufacturers as opposed to architects and contractors. The court thus agreed with the position of this author with respect to the argument that the term “products” ought to include fixtures and other manufactured items of personal property incorporated into real property for the purpose of claims against manufacturers and other commercial distributors.

4. PART I, *supra* note 2, at 416-18. After completion of PART I, in *Shumpert v. General Motors Corp.*, No. CIV.A.1:95CV322-S-D., 1996 WL 408093, at *1 (N.D. Miss. Apr. 22, 1996), the court stated, in ruling on a motion to amend plaintiff’s complaint and to remand the case to state court, “This court does not read § 11-1-65 (sic) . . . as excluding used car dealers from the ‘manufacturer or product seller’ language.” Whether this is a correct reading, given the reluctance of the courts in the past to apply strict products liability to used product sellers, remains to be seen. See PART I, *supra* note 2, at 416-18.

5. PART I, *supra* note 2, at 393.

6. PART I, *supra* note 2, at 436.

II. CATEGORIES OF DEFECT

In setting forth the bases of liability for manufacturers and sellers, the Act creates four exclusive theories of recovery: (1) design defect;⁷ (2) warnings or instructions defect;⁸ (3) deviation defect;⁹ and (4) breach of express warranty.¹⁰ According to the language of the Act, these theories govern all claims for damages except for claims for damages to the product itself. This article will address each of these statutory theories in turn.

A. Design Defect

The Act provides that in a design defect claim, a manufacturer¹¹ is not liable unless the design of the product is both defective and unreasonably dangerous.¹² In most cases, the unreasonable danger presented by a product's design is the factor that makes the design defective. However, a defect in design may not necessarily be unreasonably dangerous. A product may not perform as intended by the manufacturer because of a faulty design, but the faulty design may present no unreasonable risk of harm.¹³

The term "unreasonably dangerous," especially in the context of a design defect, is a term of art. The product's design is unreasonably dangerous only if the plaintiff proves the required elements of a claim as set forth by the Act. In logical sequence, these elements, which will be discussed in turn, are the following:

(1) The danger presented by the product's design was known or should have been known to the manufacturer (i.e., the danger was foreseeable);¹⁴

(2) the product failed to function as expected (as a result of a design characteristic);¹⁵

(3) an alternative design existed that would not impair the product's usefulness or desirability;¹⁶ and

7. MISS. CODE ANN. § 11-1-63(a)(i)(3), (f) (Supp. 1996).

8. MISS. CODE ANN. § 11-1-63(a)(i)(2), (c) (Supp. 1996).

9. MISS. CODE ANN. § 11-1-63(a)(i)(1) (Supp. 1996).

10. MISS. CODE ANN. § 11-1-63(a)(i)(4) (Supp. 1996).

11. The statute provides that liability for design defects may rest with the manufacturer or the nonmanufacturer seller. MISS. CODE ANN. § 11-1-63(a), (c), (f) (Supp. 1996). Whether the seller is liable vicariously for design defects created by the manufacturer and not known or reasonably knowable to the seller is an open question. See *infra* text accompanying notes 257-82. For purposes of facilitating discussion on the meaning of defects under the Act, reference is made to the role of the manufacturer only.

12. MISS. CODE ANN. § 11-1-63(a)(i)(3), (ii) (Supp. 1996).

13. For example, a product intended to produce bubbles may be poorly formulated so that it does not produce adequate bubbles. The design may be said to be defective. However, its poor performance because of a defective design does not make the product unreasonably dangerous. See *Patterson v. F. W. Woolworth Co.*, 786 F.2d 874, 878 (8th Cir. 1986) (Iowa law requires proof both of defect and unreasonable danger created by the defect).

14. MISS. CODE ANN. § 11-1-63(f)(i) (Supp. 1996). The Act provides: "The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought . . ." *Id.*

15. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996). The Act provides: "The product failed to function as expected . . ." *Id.*

16. *Id.* The Act provides: "[T]here existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers." *Id.*

(4) the alternative design would have to a reasonable probability prevented the harm.¹⁷

In the event that the plaintiff proves each of these elements, he must also prove that the defect existed at the time the product left the manufacturer's control¹⁸ and that it proximately caused the injury.¹⁹

1. Foreseeability as an Element of Design Defect

a. Law Prior to the Act

Under the Act, the plaintiff must prove that the manufacturer knew or should have known of the danger presented by the design of the product.²⁰ In other words, the danger must have been foreseeable to the manufacturer. The requirement of foreseeability changes the law governing proof of design defect. Under the law prior to the Act, foreseeability was not an element of the plaintiff's case. In *State Stove Manufacturing Co. v. Hodges*,²¹ the Mississippi Supreme Court first announced the adoption of strict liability theory in product liability cases. In adopting Section 402A of the Restatement (Second) of Torts,²² the court stated, "[i]f the article left the defendant's control in a dangerously unsafe condition, or was not reasonably safe, or was unsafe for its intended use, the defendant is liable whether or not he was at fault in creating that condition, or in failing to discover and eliminate it."²³ The court noted that, under a strict liability approach, the plaintiff does not need to prove defendant's negligence in creating the unsafe condition of the product or that the defendant was aware of it.²⁴ Thus, under the prior law, foreseeability of the danger was irrelevant.

Since the adoption of Section 402A by the court in *State Stove*, the court has repeatedly affirmed its commitment to strict liability theory in defective design cases. For example, in the 1973 case of *Hamilton Fixture Co. v. Anderson*,²⁵ the court found that even though the evidence indicated that the manufacturer "exercised reasonable care in the design and installation" of the product and that the "design of installation" resulted from a deliberate, prudent, and reasonable calculation, the manufacturer was nevertheless strictly liable.²⁶

The 1985 case of *Toliver v. General Motors Corp.*²⁷ provides the most detailed analysis of the court's view of strict liability in a products design case as distinguished from a negligence claim prior to the adoption of a risk-utility analysis in

17. *Id.*

18. MISS. CODE ANN. § 11-1-63(a) (Supp. 1996). The Act provides: "The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller. . . ." *Id.*

19. MISS. CODE ANN. § 11-1-63(a)(iii) (Supp. 1996). The Act provides: "The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought." *Id.*

20. MISS. CODE ANN. § 11-1-63(f)(i) (Supp. 1996).

21. 189 So. 2d 113 (Miss. 1966).

22. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

23. *State Stove*, 189 So. 2d at 120-21.

24. *Id.* at 121.

25. 285 So. 2d 744 (Miss. 1973).

26. *Id.* at 747.

27. 482 So. 2d 213 (Miss. 1985).

Sperry-New Holland v. Prestage.²⁸ In *Toliver*, the court dealt with a claim of defective design of an automobile fuel tank. The court pointed out that under a negligence standard, an engineer's design choice for an automobile fuel tank would be evaluated considering aerodynamics, cost, and industry standards. However, under a strict liability standard, such factors would be irrelevant.²⁹ The jury should consider not whether the design choice was reasonable, but whether the product was unreasonably dangerous.³⁰ The court explicitly rejected the view that design cases should be decided on negligence principles.³¹ Despite this seeming repudiation of negligence principles in strict liability cases, the *Toliver* Court stated that the plaintiff may introduce evidence of deviation from industry standards or show feasibility of alternative designs.³² Presumably, such evidence would be admissible for the purpose of proving a consumer's expectation regarding the safety of the product, even though such evidence would be typical of a negligence claim or a strict liability claim using a Wade risk-utility analysis.³³

Three years after *Toliver* the court decided *Hall v. Mississippi Chemical Express*.³⁴ In *Hall*, the court reiterated that in a strict liability case the focus is not on the manufacturer's fault or lack of fault.³⁵ Close on the heels of *Hall* came *Whittle v. City of Meridian*³⁶ in which the court emphasized that it is the danger-in-fact, not the foreseeability of the danger, that is the focus of a strict liability claim.³⁷

In the 1993 case of *Sperry-New Holland v. Prestage*,³⁸ the court explicitly rejected the consumer expectations test in determining whether a product is unreasonably dangerous in favor of the risk-utility test advocated by Dean Wade.³⁹ However, the court continued to insist that the fault of the manufacturer need not be proved.⁴⁰ Foreseeability of the danger by the manufacturer is not among the factors that Dean Wade enumerated in his famous 1973 law review article.⁴¹ The imputation of the manufacturer's knowledge of the danger is the only theoretical distinction between negligence and a strict liability approach using a risk-utility test.⁴²

This apparently strong and consistent commitment by the court to strict liability insofar as the lack of any foreseeability requirement, however, may have been

28. 617 So. 2d 248 (Miss. 1993).

29. *Toliver*, 482 So. 2d at 218.

30. *Id.*

31. *Id.*

32. *Id.*

33. See *infra* text accompanying notes 142-44 (discussing the Wade risk-utility test).

34. 528 So. 2d 796 (Miss. 1988).

35. *Id.* at 799. *Hall* is also significant for the fact that the court for the first time implicitly suggested a shift from a consumer expectations test to a risk-utility analysis in determining whether a product's design is unreasonably dangerous. *Id.*

36. 530 So. 2d 1341 (1988).

37. *Id.* at 1347. As in *Hall*, the *Whittle* Court used language consistent with a risk-utility approach to evaluating whether a product is unreasonably dangerous, without expressly rejecting the consumer expectations approach used by the court since *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966). *Id.*

38. 617 So. 2d 248 (Miss. 1993).

39. *Id.* at 256.

40. *Id.* at 253.

41. John W. Wade, *On the Nature of Strict Products Liability*, 44 Miss. L.J. 825, 839-40 (1973).

42. James A. Henderson, Jr., *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773, 803 (1979).

substantially weakened in the recent case of *Cooper v. General Motors Corp.*⁴³ *Cooper* involved a claim for injuries to the plaintiff in a car accident.⁴⁴ The plaintiffs claimed that a 1984 model car was defectively designed because it was not equipped with an airbag that would have prevented plaintiffs' decedent's death.⁴⁵ In refusing to impose liability for not installing an airbag on a 1984 model car, the court stated, "[t]he principles of law should not overlook the need for scientific development or bring manufacturers to their knees for choosing one restraint over another, in light of what was known to them at the time of their manufacturing."⁴⁶

The examination of what was known to the manufacturer at the time of manufacture in evaluating design choices sounds in negligence. The language in *Cooper* seems to go beyond the risk-utility analysis adopted in *Prestage*. The *Cooper* Court evaluated the choice between design options based on the knowledge of the manufacturer at the time of manufacture rather than based on the imputed knowledge of the danger presented by the product as designed. If, as seems likely, the court means that design choices are evaluated in light of known risks and safety effects of various alternative design choices, then strict liability has effectively ceased to exist in Mississippi, even for pre-Act cases still pending.⁴⁷

In summary, under the pre-Act law governing design defects, foreseeability of the risk of harm was regarded as irrelevant to the plaintiff's claim. However, after *Cooper*, serious questions exist as to whether the supreme court has actually abandoned a real notion of strict liability for design, even apart from the new Act.

b. Foreseeability After the Act

In contrast to the law prior to 1994, the Act specifically requires the plaintiff to prove that the defendant "knew, or in the light of reasonably available knowledge or in the exercise of reasonable care should have known" of the danger that caused the damage.⁴⁸ Thus, foreseeability of the danger is now an element of the plaintiff's case. This requirement clearly changes the law of Mississippi as it existed prior to the Act and moves the law away from strict liability toward negligence.⁴⁹ This change is particularly apparent since the court, over the years, has repeatedly emphasized the point that the fault or lack of fault of the manufacturer and the foreseeability of the danger are not at issue in a strict liability design

43. No. 92-CA-01334-SCT, 1996 WL 272362 (Miss. May 23, 1996).

44. *Id.* at *1.

45. *Id.*

46. *Id.* at *18.

47. Professor Harges argues that the Act does not change the nature of strict liability in design cases. Bobby M. Harges, *An Evaluation of the Mississippi Products Liability Act of 1993*, 63 Miss. L.J. 697, 712 (1994). However, if *Cooper* represents a departure from strict liability under the common law of Mississippi, the court is not likely to find strict liability in a design case under the new Act. MISS. CODE ANN. § 11-1-63 (Supp. 1996).

48. MISS. CODE ANN. § 11-1-63(f)(i) (Supp. 1996).

49. Exactly how far the Act moves the law and whether any significant difference remains between traditional negligence and the theory underlying the Act will depend on the interpretation of requirements pertaining to alternate design. See *infra* text accompanying notes 158-92.

case.⁵⁰ Under the risk-utility approach adopted in *Prestage*, the imputation of knowledge of the danger back to the time of manufacture is the key factor that distinguishes that approach from traditional negligence.⁵¹

Because the Act requires the plaintiff to show that the manufacturer knew or should have known of the danger in a design case,⁵² the Act permits the plaintiff to prove that the manufacturer failed adequately to research or test the design prior to commercial production. For example, a new design may create a danger that is not discovered by the manufacturer because the manufacturer failed reasonably to test the product or because the manufacturer failed to keep up with reasonably available technological advances. Proof of this failure by the plaintiff would support recovery even if the manufacturer did not actually know of the danger. However, if a danger created by a product's design was undiscoverable in light of reasonably available technology, the plaintiff's claim of defective design will fail.

While the Act clearly changes the rules on proof of a design defect by requiring proof of foreseeability, plaintiffs' attorneys are not likely to alter significantly the manner in which they present cases to juries. Most reported design defect cases involve alternative claims of negligence and strict liability.⁵³ Thus, foreseeability is an element that plaintiffs have sought to establish in most design cases even when the cases were brought under a strict liability theory. In most cases in which negligence is alleged along with strict liability, plaintiffs' counsel expect to be able to prove the elements of negligence, including foreseeability.

However, as demonstrated by *Hamilton*,⁵⁴ occasionally the plaintiff has succeeded in strict liability where the alternative negligence claim failed. In *Hamilton*, the court explicitly recognized the reasonableness of the design choices made by the manufacturer, implying that the danger was not reasonably foreseeable.⁵⁵ Nevertheless, the court found that the product was unreasonably dangerous and the manufacturer was liable.⁵⁶

c. Policy Issues

The Act's foreseeability requirement clearly is more favorable to the manufacturer in a design case. One of the functions of strict liability is to relieve the plaintiff of the burden of proving foreseeability and reasonableness of the design because the plaintiff often has less access to the information necessary to prove the negligence of the manufacturer and courts believe this to be an unfair disad-

50. See *supra* text accompanying notes 20-47.

51. MISS. CODE ANN. § 11-1-63(f)(i) (Supp. 1996).

52. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 253 (Miss. 1993). The court stated: "In a 'risk-utility' analysis, a product is 'unreasonably dangerous' if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. *Id.* See also Henderson, *supra* note 42, at 803.

53. E.g., *Prestage*, 617 So. 2d at 250.

54. *Hamilton Fixtures Co. v. Anderson*, 285 So. 2d 744 (Miss. 1973).

55. *Id.* at 747.

56. *Id.*

vantage.⁵⁷ In theory, the foreseeability requirement serves to make the plaintiff's burden more difficult.

Another argument advanced for the elimination of foreseeability in design cases is the contention that strict liability encourages manufacturers to go beyond customary practices in search of better and safer products.⁵⁸ If manufacturers can rely on existing knowledge or reason to know at the time of manufacture, they may be discouraged from seeking new and improved ways to design products.⁵⁹

However, strong arguments exist that support a foreseeability requirement. Because unforeseeable risks are by definition unpredictable, manufacturers would find it difficult, if not impossible, to obtain adequate insurance or to establish adequate self-insurance reserves.⁶⁰ While proponents of strict liability argue that manufacturers will invest more effort to discover and eliminate design dangers, opponents point out that such increased investment in safety is a matter of guess-work.⁶¹ If a risk is unforeseeable, the manufacturer does not know where to direct its research efforts to prevent such a risk.

Opponents of strict liability argue that it is an inefficient method of providing insurance against unforeseeable injuries.⁶² Providing insurance to product users through the legal process is expensive and wasteful. For example, much of the award to compensate the plaintiff for an unforeseeable injury typically goes to cover litigation expenses and attorney fees. Product costs for the vast majority of users who are not injured will increase, in part, because of the inefficiency of the tort system as a system of social insurance.⁶³

Perhaps the most fundamental argument in favor of a foreseeability requirement is the lack of fairness to the defendant who is held liable without fault. Imposition of liability for unforeseeable risks does not allow a manufacturer to be judged by a standard of normative behavior to which the manufacturer can reasonably conform.⁶⁴ Professor Owen, a strong opponent of strict liability in design claims, has argued that "tort law [must] have a moral center" which serves to "promote human freedom, to the extent it can do so without undue cost."⁶⁵ Strict liability, however, is a loss shifting mechanism, without any intrinsic moral value.⁶⁶

57. Aaron D. Twerski & Alvin S. Weinstein, *A Critique of the Uniform Product Liability Law — a Rush to Judgment*, 18 DRAKE L. REV. 221, 228 (1978-79); Jerry J. Phillips, *Achilles Heel*, 61 TENN. L. REV. 1265, 1274 (1994).

58. See Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1041-42 (Or. 1994).

59. Phillips, *supra* note 57, at 1274. See also Habecker v. Clark Equip. Co., 942 F.2d 210, 216 (3rd Cir. 1991); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 484 (1979), RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, §2 cmt. a (Proposed Final Draft, 1997) [hereinafter FINAL DRAFT].

60. James A. Henderson, Jr., *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 TOURO L. REV. 107, 116 (1993).

61. FINAL DRAFT, *supra* note 59, §2 cmt. a.

62. E.g., Henderson, *supra* note 60, at 117-19.

63. Henderson, *supra* note 60, at 119-120; David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 718 (1992).

64. Henderson, *supra* note 60, at 116.

65. Owen, *supra* note 63, at 719.

66. Owen, *supra* note 63, at 718. See also Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 622 (1980). Birnbaum observed regarding imputed knowledge of an unknowable danger that "[i]t is questionable whether a criterion for liability purportedly based on a notion of reasonableness can be justly and fairly applied when cognition of risks is imposed as a matter of law rather than as a matter of fact." *Id.*

A foreseeability requirement represents a change from the law as it existed before 1994. However, the Act's foreseeability requirement is consistent with the position taken in the Final Draft of the Restatement (Third) of Torts: Products Liability and the bulk of recent scholarship on the subject.⁶⁷ The change is not so radical as it might first appear. Most cases tried under the pre-1994 law involved negligence claims, and hence foreseeability of the risk. With the adoption of a risk-utility analysis, the change becomes even less radical, because in the view of many commentators, the application of risk-utility is barely distinguishable from negligence.

2. The Product Failed to Function as Expected

The requirement that the plaintiff prove that the product failed to function as expected is one of the most problematic aspects of the Act. Among the problems created by this requirement is that the Act does not explicitly set out whose expectation is controlling in evaluating the product's performance. Three possible interpretations are presented and evaluated here:

(1) product performance is to be evaluated in light of the subjective expectations of the actual user or consumer;

(2) product performance is to be evaluated in light of the knowledge common to ordinary consumers and users; or

(3) product performance is to be evaluated in light of the expectations that a reasonable, fully-informed consumer or user would have a right to expect with regard to product safety.⁶⁸

a. The Expectations of the Actual User or Consumer

The subjective expectations of the actual user or consumer are certainly within the possible meanings of the phrase "failed to function as expected" as found in the Act.⁶⁹ However, the courts are unlikely to interpret the Act in such a manner. Reliance on the subjective expectations of actual users or consumers as the basis for determining product defectiveness has no history in the Mississippi cases. Rather, prior to *Prestage*,⁷⁰ the court followed a consumer expectations test rooted in the reasonable expectations of the ordinary consumer was followed.⁷¹

Moreover, a subjective approach to the expectations of product performance would not provide a rational basis for determining design defect on a case-by-case basis.⁷² Manufacturers would find no guidance from cases decided on such

67. FINAL DRAFT, *supra* note 59, § 2 cmt. d., reporter's note at 84.

68. A fourth alternative, the expectation of the manufacturer, is also possible but unlikely. Such an interpretation would have no judicial or academic roots. The language of the Act does not in any way suggest that such an approach is meant. Moreover, such an approach would run counter to the well-developed traditions in the field of products liability law.

69. MISS. CODE ANN. § 11-1-63 (Supp. 1996).

70. *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993).

71. *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162, 169 (5th Cir. 1992) (recognizing that Mississippi uses an objective standard "from the perspective of the 'ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics,'" and rejecting arguments that the court should use a subjective standard).

72. *Cf. Richard N. Pearson, Thoughts for a Restatement of the Law of Products Liability*, 4 PROD. LIAB. J. 61, 70-71 (1993).

a basis because the expectations as to product performance likely would be different in each case. Verdicts are likely to be inconsistent.⁷³ Cases could theoretically be decided on the basis of irrational and unrealistic expectations of product performance. For example, an automobile driver may have an unreasonable expectation that his car is perfectly safe and impervious to harms in collisions, an expectation that is unreasonable. However, if a jury were to accept the plaintiff's claim that such was his actual expectation, the plaintiff will have met the first element of his claim.⁷⁴ However, the law does not typically protect the irrational and unreasonable expectations of parties. There is no reason to believe that the Act intends to give protection to such expectations in this situation. On the other hand, an unrealistically low expectation of safety should not be used as a bar against recovery. An automobile user who irrationally believes that an automobile can provide no safety at all should not be barred from recovery for an injury that a proper design could have prevented.

The lack of logical consistency in a subjective approach may be further illustrated. For example, a sophisticated user with greater knowledge than is common to the ordinary user may have greater expectations of safety than the ordinary user because he is familiar with available design technology. In this case, the sophisticated user may recover while the less informed user would not because the latter's expectations would not be as high. Conversely, a more sophisticated user with greater knowledge of design limitations may have a lower expectation of safety than an ordinary consumer, with the result that the sophisticated user may not recover for an injury, but the less sophisticated consumer may.⁷⁵

All in all, little commends the subjective approach to design defect. The approach would lead to confusion and inconsistent verdicts, reward the irrational and unrealistic expectations of some, and deny recovery in cases where it should be granted. Since the Act's language does not compel the use of a subjective approach, the courts should avoid such an interpretation.

b. The Expectations of the Ordinary Consumer

The test of whether a product failed to function as expected is more likely to be analyzed in light of the expectations of the ordinary consumer with ordinary knowledge of the community. The Act's language is reminiscent of language used by the court in *State Stove* to define the concept of defective condition: "the article has something wrong with it; . . . it did not function as expected."⁷⁶ In *State Stove*, the court adopted Section 402A and its approach to determining when a product is unreasonably dangerous.⁷⁷ Under this approach, the ultimate

73. Birnbaum, *supra* note 66, at 613.

74. The Act also requires the plaintiff to prove that a feasible alternative design existed as well. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996). In most cases, a feasible alternative design would not be available where such an irrational expectation exists.

75. Assumption of the risk might provide a defense to the sophisticated user in any event, but the defendant must show all of the elements, including a full appreciation of the risk and the voluntariness of encountering the risk. MISS. CODE ANN. § 11-1-63(d) (Supp. 1996).

76. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 121 (Miss. 1966).

77. *Id.*; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

consumer's contemplation is the focus of the inquiry into the degree of danger presented by a product.⁷⁸ However, the consumer in view is the ordinary consumer, not the actual consumer. Comment i to Section 402A, quoted with approval by the court in *Ford Motor Co. v. Matthews*,⁷⁹ states that a product is "unreasonably dangerous if it is dangerous to an extent beyond that which was contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics."⁸⁰ The objective nature of the test was reinforced in *Coca Cola Bottling Co. v. Reeves*⁸¹ in which the court approved as "essentially correct" a jury instruction by the trial court defining "defective product" as one "that does not meet the reasonable expectations of an ordinary consumer as to the safety of the product."⁸²

Since the language used in the statute has antecedents in the Mississippi cases, the courts most likely will interpret the Act consistently with the nearly identical language used by the supreme court in applying the consumer expectations test.⁸³ Moreover, this approach has a parallel in the language of the Act regarding products that have inherent generic characteristics that "cannot be eliminated without substantially compromising the product's usefulness or desirability."⁸⁴ Such products are not defectively designed when "the ordinary person with the ordinary knowledge common to the community" recognizes such inherent characteristics.⁸⁵

The use of a consumer expectations test, even if based on the knowledge common to ordinary users of the product, has its own problems. The consumer expectations test has been repeatedly and widely criticized since its introduction in the comments to Section 402A.⁸⁶ Dean Wade criticized the test's standing independently of other factors because "the consumer would not know what to expect, because he would have no idea of how safe the product could be made."⁸⁷ Sheila Birnbaum likewise has pointed out that consumers are often ill-equipped to formulate reasoned expectations about safety.⁸⁸ In the absence of the plaintiff's proof of what the ordinary consumer expected as to product safety, the manufacturer is entitled to escape liability.⁸⁹ Professor Gary Schwartz has writ-

78. *State Stove*, 189 So. 2d at 121. See also RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g (1965).

79. 291 So. 2d 169 (Miss. 1974).

80. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This test has been generally, if not universally, referred to as the consumer expectations test.

81. 486 So. 2d 374 (Miss. 1986). See also *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162, 169 (5th Cir. 1992) ("[T]he subjective knowledge or belief of the individual plaintiff about the product involved has little relevance.").

82. *Reeves*, 486 So. 2d at 384-85. Likewise the court in *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 254 (Miss. 1993), recognized comment i as the source of Mississippi's consumer expectations test as applied before adoption of the risk-utility analysis of defect and that the expectation was that of an ordinary consumer.

83. Cf. OHIO REV. CODE ANN. § 2307.75(A)(2) (Banks-Baldwin 1993); TENN. CODE ANN. § 29-28-102(8) (1980).

84. MISS. CODE ANN. § 11-1-63(b) (Supp. 1996).

85. *Id.*

86. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

87. Wade, *supra* note 41, at 829.

88. Birnbaum, *supra* note 66, at 604-05.

89. Pearson, *supra* note 72, at 71 (citing *Heaton v. Ford Motor Co.*, 435 P.2d 806 (Or. 1967), in which the court dismissed the plaintiff's claim because he presented no proof of ordinary consumer expectation about the strength of a pick-up involved in a particular type of collision).

ten that identifying the substance of consumer expectations," or even developing a methodology for identifying their substance, proves to be a frustrating task. There is a paucity of empirical studies providing any clear answers as to what ordinary consumers expect of the products they buy."⁹⁰

A second, and related, major criticism of the consumer expectations test has focused on its vagueness and lack of guidance for a jury in determining whether a product's design is unreasonably dangerous. Birnbaum has noted that a literal application of comment i to Section 402A invites the trier of fact to "rely on some vague common sense notion of what the ordinary consumer expects in the way of safety."⁹¹ Likewise, Professors Henderson and Twerski, reporters for the Restatement (Third) of Torts: Products Liability,⁹² have observed that the consumer expectations test, standing independently, "is so open-ended and unstructured, that it provides almost no guidance to the jury determining whether a defect existed."⁹³ Similarly, Philip Corboy has pointed out that the consumer expectations test "leads to confusion in a large number of cases, such as workplace accidents and injuries to bystanders, where the plaintiff who was injured is not the consumer who purchased the product."⁹⁴

Moreover, as Birnbaum points out, manufacturers of products with open and obvious defects may escape liability altogether, even though the manufacturer "could have cost-efficiently eliminated the risk."⁹⁵ The avoidance of all liability for open and obvious defects, even those that could be readily eliminated, was the major reason that the Mississippi Supreme Court rejected the consumer expectations test in *Prestage*.⁹⁶ The court recognized that under the consumer expectations test as applied in Mississippi, "if [a] plaintiff, applying the knowledge of an ordinary consumer, sees a danger and can appreciate that danger, then he cannot recover for any injury resulting from that appreciated danger."⁹⁷ The open and obvious defense under a consumer expectations test is broader than the assumption of risk defense because the former affects those who were subjectively unaware of the danger and those who did not voluntarily encounter the danger, such as those persons who have no choice but to use the product.

One may cynically suggest that a manufacturer, under an approach which denies recovery for open and obvious dangers no matter how easily corrected by

90. Schwartz, *supra* note 59, at 478. See also Pearson, *supra* note 72, at 70. (arguing that "[i]t is not reasonably practical to determine what consumers actually expect of a product.").

91. Birnbaum, *supra* note 66, at 615.

92. FINAL DRAFT, *supra* note 59.

93. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1534 (1992).

94. Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043, 1088 (1994).

95. Birnbaum, *supra* note 66, at 613. See also David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1247 (1994) (pointing out that manufacturers have often used the consumer expectations test as a sword to defeat claims where there are open and obvious dangers or the consumer expectations are underdeveloped or "cynically realistic"); Corboy, *supra* note 94, at 1088 (observing that many trial practitioners find it difficult to show that ordinary consumers entertained any specific expectations about product safety or performance).

96. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 (Miss. 1993).

97. *Id.*

the manufacturer, has an incentive to make products less safe as long as the lack of safety is obvious or perhaps warned about.⁹⁸ For example, manufacturers would have no economic incentive, except potential marketing advantages, for making safer industrial equipment with adequate guards. If the lack of guards were obvious, injured workers would have only worker's compensation claims, even though the danger could be readily and reasonably avoided by the manufacturer.⁹⁹

Critics have not directed all of their fire at the consumer expectations test because of its use against plaintiffs. Defendants also are at risk because the jury has little guidance other than their subjective sense as to what an ordinary consumer might expect.¹⁰⁰ Moreover, as Professors Henderson and Twerski have pointed out, manufacturers find no guidance in the test in making design decisions.¹⁰¹ Manufacturers charged with making products as safe as ordinary consumers expect also lack reliable data on the actual expectations of consumers.¹⁰² Taking such expectations into consideration in designing products is all but impossible for complex products, especially ones that are new to the market.¹⁰³ Moreover, a determination that a product is defective based on a vague standard like the consumer expectations test can have significant repercussions on an entire product line.¹⁰⁴

The language of the Act requiring the plaintiff to prove that the product "failed to function as expected" also creates the possibility that a manufacturer will argue that if it adequately warned of the danger created by the design, it had no duty to adopt a safer, feasible alternative design.¹⁰⁵ According to this argument, because the user was made aware of the danger, the product did not fail to function as expected.

Prior to the adoption of the risk-utility test, the Mississippi Supreme Court did not deal with such a defense under the law. However, some support exists for the view that Mississippi law prior to the adoption of a risk-utility analysis would not

98. One can imagine automobile manufacturers removing many safety devices from cars (absent government regulatory requirements) and advertising such cars at a reduced price with appropriate warnings. The argument has been made that if consumers are informed of dangers, they should, as a principal of personal freedom, be allowed to choose to use such products. Cf. *Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272362 at *18 (Miss. May 23, 1996) ("[I]f [plaintiffs] wanted a car with an air bag, they should have purchased a car with an air bag."). Cars are perhaps not the best example since automobile safety involves more than just the purchasers, such as passengers who may be unaware of the lack of safety or children who are unable to protect themselves otherwise. Industrial equipment also would be vulnerable to decrease in safety. Manufacturers would have little incentive to make safety guards a priority in design when their absence is obvious because only the employer is liable in worker's compensation claims.

99. A majority of courts have rejected the open and obvious or patent danger defense in design defect cases. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 281 (1990).

100. Cf. Birnbaum, *supra* note 66, at 614; Henderson & Twerski, *supra* note 93, at 1534. See also Melton v. Deere & Co., 887 F.2d 1241, 1247 (5th Cir. 1989) (Reavely, J., dissenting) (criticizing a consumer expectations test that allows a decision based on uninformed consumers' subjective expectations).

101. Henderson & Twerski, *supra* note 93, at 1534.

102. Cf. Schwartz, *supra* note 59, at 478.

103. Cf. Birnbaum, *supra* note 66, at 604.

104. William A. Worthington, *The "Citadel" Revisited: Strict Tort Liability and the Policy of Law*, 36 S. TEX. L. REV. 227, 251 (1995).

105. Cf. Schwartz, *supra* note 59, at 476.

permit a defense that warnings would be a sufficient method of avoiding liability in a defective design claim where a feasible alternative design existed. In *Jackson v. Johns-Manville Sales Corp.*,¹⁰⁶ the Fifth Circuit, applying Mississippi law, stated, "[w]ith respect to products that are unavoidably unsafe, the manufacturer is under a duty to provide adequate warning of those dangers that are reasonably foreseeable."¹⁰⁷ From this statement, one can infer that a product for which an alternative design exists is not "avoidably unsafe," thus a warning alone would not be a sufficient response by the manufacturer to avoid liability. If, as seems likely, such a view were the law under Mississippi's former consumer expectations approach, the court would probably follow that approach even under the new Act.

Under a pure risk-utility analysis, a warning would be insufficient to defeat a claim of defective design if the risk is greater than the utility of the product, even considering the warning.¹⁰⁸ However, under the Act, the result is not clear. The language lends itself to the argument that adequate warnings can avoid liability for design defects, even if such defects are not otherwise obvious. Such a result would be an unfortunate and unconscionable distortion of the duty to design reasonably safe products.¹⁰⁹

Admittedly, the Act does not rely entirely on the consumer expectations test to determine defectiveness in design; however, because the test stands independently of other elements of design defect, the criticisms of the test remain applicable to the requirement that the plaintiff prove the product failed to function as expected. The flaws in a consumer expectations test remain: lack of consumer knowledge of how safe a product can be made, unrealistically low or high expectations, the vagueness of the standard, and the lack of incentive to manufacturers to correct obviously dangerous designs.

Mississippi's requirement that the plaintiff prove both that the product failed to function as expected and a feasible alternative design (a type of risk-utility test)¹¹⁰ appears to be unique. The combination of two different and required tests goes beyond the requirements in any other American jurisdiction. Recent tort reform products liability statutes in other states have adopted a risk-utility analysis¹¹¹ or allow the plaintiff to prove a defective design under either a consumer expectations test or a risk-utility test.¹¹² No cases in other jurisdictions seem to

106. 727 F.2d 506, 516 (5th Cir. 1984), *on reh'g*, 750 F.2d 1314 (5th Cir. 1985)(applying Mississippi law).

107. *Id.* However, the court cited no Mississippi authority for such a proposition, instead citing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (applying a risk-utility analysis under Texas law). *Id.*

108. See *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 847 (N.H. 1978) (citing John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability of Defective Products*, 27 S.C. L. REV. 803, 837 (1976) and Aaron D. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 14 (1974)); See also *Robinson v. G.G.C., Inc.*, 808 P.2d 522 (Nev. 1991).

109. Cf. Birnbaum, *supra* note 66, 613-14 (pointing out that leading commentators and most courts have rejected the patent danger rule as "undermining the duty of manufacturers to design safe products and unconscionably denying recovery to injured plaintiffs").

110. See *infra* text accompanying notes 175-86.

111. E.g., LA. REV. STAT. ANN. § 9:2800.56 (West 1991); ILL. COMP. STAT. § 5/2-2104 ch. 735 (West Supp. 1996); TEX. CODE ANN. § 82.005 (Supp. 1997).

112. OHIO REV. CODE ANN. § 2307.75 (Banks-Baldwin 1993).

require that both tests be satisfied in order for a plaintiff to prove a defect. Moreover, the drafters of the Model Uniform Product Liability Act rejected the consumer expectations test altogether as an appropriate basis for deciding design defect cases.¹¹³ The Final Draft also rejects the consumer expectations test as an independent or stand alone test of design defectiveness.¹¹⁴ Rather, the comments to the Final Draft approach consumer expectations as simply one factor among many in a risk-utility evaluation of design.¹¹⁵

The primary effect of an objective consumer expectations test, if that is what the Act mandates, is to make the plaintiff's case more difficult. Not only must a plaintiff prove that the defendant, for all practical purposes, was negligent in failing to adopt an alternative, safer design, but the plaintiff must prove that the design used by the manufacturer was not obviously dangerous or that the ordinary consumer had a particular expectation as to the product's safety that the product failed to meet. If the ordinary consumer does not have an expectation as to a product's performance or has an unreasonably low expectation, the plaintiff will be barred from recovery regardless of the feasibility of an alternative design. The traditional function of products liability law of encouraging, whether through negligence or strict liability theory, the manufacture of safer products has largely been sacrificed in the rush to raise barriers to plaintiffs. Caveat emptor has returned to Mississippi with a vengeance.

c. Expectations of the Fully-Informed Consumer

An alternative interpretation of the phrase "failed to function as expected" could focus on the expectations that a reasonable, fully-informed consumer has a right to expect, rather than some vaguely empirical notion of what ordinary consumers may be expected actually to know. Some courts have applied the consumer expectations test in this manner. In *Seattle-First National Bank v. Tabert*,¹¹⁶ the Supreme Court of Washington held that "in determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case."¹¹⁷

113. MODEL UNIFORM PRODUCT LIABILITY ACT § 104 (B), Analysis, 44 Fed. Reg. 62714, 62724 (Dep't. Commerce 1979) [hereinafter MODEL ACT].

114. FINAL DRAFT, *supra* note 59, § 2 cmt. g.

115. FINAL DRAFT, *supra* note 59, § 2 cmt. g.

116. 542 P.2d 774 (Wash. 1975).

117. *Id.* at 779.

Under the *Tabert* approach, the consumer expectations test is functionally the same as a risk-utility analysis.¹¹⁸ Commentators advocating the continued use of consumer expectations support the test in this form. Professor Jerry Phillips argues that a buyer “can expect a . . . product to be made more safely once her expectations have been informed . . . by expert testimony.”¹¹⁹ The obviousness of the danger would not serve as a complete bar because an adequately informed user or buyer could expect the product to be made more safely.¹²⁰ Professor John Culhane similarly argues that the focus of the consumer expectations test ought to be on what level of safety “a reasonable consumer has the right to expect.”¹²¹

Obviously, the level of safety that a reasonable consumer has a right to expect is a reasonable one upon a balancing of the risks posed by the product as designed against its utility and the availability of feasible alternative designs. The consumer expectations test based on a fully informed consumer then becomes indistinguishable from a risk-utility analysis. Should the court adopt this interpretation, the open and obvious danger bar to recovery could be avoided. The obviousness of the danger would be one factor that would be considered in determining whether a reasonable consumer would expect the product to function more safely.¹²² In essence, the *Prestage* adoption of risk-utility would survive the adoption of the Act because the two tests would not differ.

The weakness in this argument is found in the pronouncement of the court in *Prestage* that the consumer expectations test bars recovery when the danger is open and obvious to the ordinary consumer.¹²³ There is no precedent in Mississippi cases to support an interpretation of the language of the Act to allow the *Tabert* type of approach to consumer expectations.¹²⁴ Indeed, while Judge Reavely in his dissent in *Melton v. Deere & Co.*¹²⁵ suggested that the Mississippi cases supported a reading which would allow the evidence of defective design to include more than the subjective, uninformed consumer’s expectations, the court in *Prestage* did not follow this reading. Instead, the court rejected the consumer expectations test standing alone as being incompatible with public policy in products liability design cases.¹²⁶

118. *Racer v. Utterman*, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981), (observing that a test of negligence when using hindsight and a consumer expectations test of the type used in *Tabert* “may in fact be the same—simply different directions from which to arrive at the same result”); Birnbaum, *supra* note 66, at 615 (observing that such an approach “adds essentially nothing of substance to a straightforward risk-utility balancing approach”). Cf. *Melton v. Deere & Co.*, 887 F.2d 1241, 1247 (1989) (Reavely, J., dissenting) (arguing in opposition to the application of open and obvious danger as a complete bar that the Mississippi cases supported the view that evidence should not be limited to the expectations of “uninformed consumers’ subjective expectations” and that the court should focus “on whether a reasonable person informed of the product’s design characteristics and performance would consider it unreasonably dangerous”).

119. Phillips, *supra* note 59, at 1273.

120. Phillips, *supra* note 59, at 1273.

121. John G. Culhane, *The Limits of Product Liability Reform Within a Consumer Expectation Model: A Comparison of Approaches Taken by the United States and the European Union*, 19 HASTINGS INT’L & COMP. L. REV. 1, 65 (1995).

122. See Wade, *supra* note 41, at 837.

123. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 (Miss. 1993).

124. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996).

125. 887 F.2d 1241, 1247 (5th Cir. 1989) (Reavely, J., dissenting).

126. *Prestage*, 617 So. 2d at 256.

If the language of the Act is to be understood in terms of the usage in the cases which preceded the Act, the most likely interpretation of the phrase "failed to function as expected" remains rooted in the expectations of the ordinary consumer with knowledge common in the community. Interpreting expectations in light of what a consumer should have a right to expect does not have any support in the traditional understanding of the consumer expectations test in Mississippi. Moreover, if a risk-utility approach were to be understood as being incorporated in this test, it would add little to the other requirements of foreseeability of the danger and feasibility of alternative design. The latter requirement mandates a balancing of risk and utility which would not be different, in essence, from a risk-utility approach to consumer expectation. The "failed to function as expected" language would be superfluous.

3. Alternative Design

a. The Law Prior to the Act

Prior to the effective date of the Act, the law of Mississippi did not appear explicitly to require that the plaintiff show an alternative design to make out a prima facie case in a Section 402A design defect claim.¹²⁷ No Mississippi Supreme Court opinion has declared that proof of feasible alternative design is a required element of the plaintiff's proof under either the consumer expectations test or the risk-utility test. While most plaintiffs in design cases based on theories of negligence and strict liability seek to introduce evidence of alternative design,¹²⁸ the Mississippi Supreme Court has never explicitly required that they do so.¹²⁹

Under the consumer expectations test as applied in Mississippi, a product was deemed to be unreasonably dangerous and defective if it failed to supply the level of safety expected by the ordinary consumer.¹³⁰ Under this test, the focus of the inquiry as to defective design in a strict liability claim under Section 402A is on the expectation of the ordinary consumer, not on the feasibility of an alternative design.¹³¹ As asserted by Professor Marshall Shapo, nothing in the language of Section 402A appears to require an alternative design.¹³²

In *Toliver v. General Motors Corp.*,¹³³ the supreme court recognized that the plaintiff, under a consumer expectations approach in a design claim, may offer

127. *Prestage*, 617 So. 2d at 256.

128. Philip H. Corboy, a plaintiff's attorney, has observed that "[a]s a practical matter, . . . the plaintiff's attorney who does not demonstrate that a safer product was available to defendant overlooks what may be the most persuasive and compelling aspect of plaintiff's claim in the eyes of the jury." Corboy, *supra* note 94, at 1092.

129. *Cf. Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96-97 (Minn. 1987) ("Although normally evidence of a safer alternative design will be presented initially by the plaintiff, it is not necessarily required in all cases.").

130. *Toliver v. General Motors Corp.*, 482 So. 2d 213, 218 (Miss. 1985).

131. *Id.* at 218. See also *Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272362 at *17 (Miss. May 23, 1996), in which the court observed that a consumer has no right to expect added safety by an appliance which is known by the consumer not to be present in the defendant's product.

132. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 669 (1995).

133. 482 So. 2d 213 (Miss. 1985).

evidence of an alternative design in order to show its feasibility.¹³⁴ The plaintiff may offer such evidence in the same way that she may, but without being required to do so, introduce evidence of a defendant manufacturer's deviation from industry standards.¹³⁵ Nevertheless, no Mississippi case applying either a consumer expectations test or a risk-utility analysis has required proof of feasible alternative design as a prerequisite to a *prima facie* case of defective design.¹³⁶

The court's discussion of permitting proof of alternative design does not amount to a requirement that the plaintiff must introduce such proof.¹³⁷ Under the consumer expectations test, proof of a feasible alternative design may be relevant as evidence of an ordinary consumer's expectation of a product's safety. The absence of an alternative design, particularly if such an absence was known to the ordinary consumer, would be relevant to prove the consumer's expectations as to the level of safety of a product. On the other hand, if the ordinary consumer were aware of product designs which were feasible, the expectation of safety might be disappointed by the absence of such designs in the defendant's product. This disappointment would be especially evident where the absence of such design characteristics was not disclosed or readily observable by the ordinary consumer. Nevertheless, the absence of a feasible alternative design does not automatically defeat consumer expectation of a particular level of safety.

Similarly, the fact that the Mississippi Supreme Court recognized that a product need not be the safest possible in order to be reasonably safe,¹³⁸ does not necessarily lead to the view that under the pre-1994 law a plaintiff must produce evidence of a feasible alternative design.¹³⁹ The ordinary consumer does not necessarily expect that a product must be the safest product possible, but she does have some level of safety expectation of the product she purchases. For example, consumers often have reduced safety expectations when purchasing products known to be of a lesser quality or more cheaply made than other similar products or models. Thus, a purchaser of an inexpensive subcompact car likely would not have the same expectations as one who purchases a more expensive, heavier car replete with the latest safety advances. The purchaser of a subcompact car

134. *Id.* at 218.

135. *Id.*

136. The Fifth Circuit seems to have interpreted Mississippi law prior to the Act as requiring proof of an alternative design in *Lloyd v. John Deere Co.*, 922 F.2d 1192 (5th Cir. 1991). In *Lloyd*, the plaintiff alleged that a tractor made some twenty years before rollover bars were feasible was defective because of the absence of rollover bars. *Id.* at 1193. The court held that the danger of rollover was open and obvious. *Id.* at 1195. This finding alone would have been sufficient to bar plaintiff's claim under a consumer expectations test since the product was not more dangerous than expected by the ordinary consumer. Nevertheless, the court also found that the plaintiffs "failed to adduce sufficient evidence, including of a feasible alternative design, to withstand a directed verdict on the design claim." *Id.* at 1196. The court cited no Mississippi Supreme Court authority for this latter ruling, and there appears to be no such authority. On the other hand, the Mississippi Supreme Court has not held that a defendant was liable, regardless of the lack of proof of an alternative design.

137. Professor Harges has suggested that the Act not change the law in requiring proof of an alternative design based the language of *Toliver* permitting introduction of evidence of an alternative design. Harges, *supra* note 47, at 716. However, permitting the introduction of such evidence is not the equivalent of requiring such evidence.

138. *Hall v. Mississippi Chem. Express*, 528 So. 2d 796, 799-800 (Miss. 1988).

139. *But see* Harges, *supra* note 47, at 716.

expects her car to be reasonably safe but not as safe as the more expensive, better-equipped model.

The adoption of a risk-utility test for defective design by the supreme court¹⁴⁰ did not necessarily result in a requirement of proof of a feasible alternative design as a part of the plaintiff's case. Under the risk-utility approach, feasibility of alternative design is a significant factor and often may be a determining factor; however, it is not a *sine qua non* of such an analysis.¹⁴¹ In his famous article advocating a risk-utility analysis for defective design, Dean Wade listed seven significant factors to be evaluated.¹⁴² Among these factors are the availability of a substitute product and "the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility."¹⁴³ Dean Wade did not suggest that any single factor is necessary to the plaintiff's *prima facie* case. Indeed, he suggested that the jury normally not be told of the specific factors but instead to be given a more generalized instruction about "what a reasonable prudent man would do under the same or similar circumstances."¹⁴⁴

For example, under a risk-utility approach one might argue that a particular product is so dangerous that, despite the fact that no alternative design exists, a reasonable person would not have placed the product in the stream of commerce.¹⁴⁵ Moreover, if another product performs the same function for nearly the same cost as efficiently and more safely than the defendant's product, the defendant's product may be deemed unreasonably dangerous even if no alternative design is available. A jury might conclude, if the evidence were to show such, that a three-wheeled all-terrain recreational vehicle's function could be performed as efficiently and cost effectively as a more stable and safer four-wheeled version. The jury, therefore, could conclude that the three-wheeled version was

140. *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993).

141. *See Corboy, supra* note 94, at 1092-95.

142. Wade, *supra* note 41, at 837. The factors are:

(1) The usefulness and desirability of the product — its utility to the user and to the public as a whole. (2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury. (3) The availability of a substitute product which would meet the same need and not be as unsafe. (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. (5) The user's ability to avoid danger by the exercise of care in the use of the product. (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions. (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. In *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 n.3 (Miss. 1993), the supreme court cited with approval Dean Wade's seven factors for use in a risk-utility analysis.

143. Wade, *supra* note 41, at 837.

144. Wade, *supra* note 41, at 840.

145. Such an argument has been made against cigarettes. *See, e.g.*, Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1446-49 (1994). *Cf.* *Horton v. American Tobacco Co.*, 667 So. 2d 1289 (Miss. 1995), discussed *infra* (plurality affirming a finding that cigarettes are unreasonably dangerous, but without discussion of alternative designs). *See also Corboy, supra* note 94, at 1096 (discussing a children's toy which consisted "of a blob of mercury [a toxic chemical] encased in a plastic maze" for which no substitute was available to replace the mercury's function).

unreasonably dangerous and that the defendant is liable.¹⁴⁶ As this example illustrates, alternative design is not necessarily a component of the plaintiff's required proof under a risk-utility test.

In most cases, the absence of alternative design will result in a defendant's verdict on the ground that the utility of the product as designed outweighed its risks because an alternative was not available.¹⁴⁷ However, the Mississippi Supreme Court never precluded a plaintiff from arguing that a product was defectively designed even if no alternative design existed. The case of *Horton v. American Tobacco Company*,¹⁴⁸ presented what may have been the best opportunity for the court to discuss the alternative design requirement under pre-1994 law.

In *Horton*, the plaintiffs pursued a wrongful death claim arising from the death of plaintiffs' decedent from lung cancer allegedly caused by the manufacturer's defectively designed cigarettes.¹⁴⁹ A divided court affirmed the jury finding that the cigarettes were defectively designed but that plaintiffs were not entitled to any damages.¹⁵⁰ A majority concluded that the trial court erred in its instructions by giving a consumer expectations test of defect rather than a risk-utility test.¹⁵¹ A plurality concluded that the error in the instruction on defect was harmless and that the evidence supported a finding of defect under the risk-utility analysis.¹⁵² The brief of the appellees/cross-appellants raised the argument that plaintiffs were required to prove an alternative design,¹⁵³ but the court did not address this point. The plurality opinion does not mention the issue of alternative design. The plaintiff offered evidence that the manufacturer "spiked" its product with additives, such as additional nicotine and human carcinogens.¹⁵⁴ Presumably the plurality found this evidence sufficient to sustain a finding that the product could have been made more safely, thus avoiding the alternative design problem, although the plaintiff did not explicitly argue this position on appeal.¹⁵⁵

The minority opinion, authored by then Chief Justice Hawkins, rejected risk-utility as an appropriate test to apply to cigarette design cases.¹⁵⁶ The Chief Justice conceded that any reasonable person would conclude that the dangers of

146. Cf. *Antley v. Yamaha Motor Corp., U.S.A.*, 539 So. 2d 696, 703 (La. Ct. App. 1989). Professors Henderson and Twerski contend that it is inappropriate to find a product unreasonably dangerous in the absence of an alternative design because this results in the condemnation of a product category and such a condemnation is outside of the courts' competence. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without a Defect*, 66 N.Y.U. L. REV. 1263, 1301-31 (1991). See *infra* text accompanying notes 192-95.

147. Whether a majority of jurisdictions support proof of a reasonable alternative design as a requirement of the plaintiff's design defect case is hotly disputed. See TENTATIVE DRAFT, *supra* note 59, cmt. c, reporter's note at 48-50 (supporting the view that this is the majority position). Cf., e.g., Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1408 (1994).

148. 667 So. 2d 1289 (Miss. 1995).

149. *Id.* at 1289-90.

150. *Id.*

151. *Id.*

152. *Id.*

153. Brief for Appellees/Cross Appellants at 20-21, *Horton* (No. 91-CA-0006).

154. *Horton v. American Tobacco Co.*, 667 So. 2d 1289, 1301 (Miss 1995) (Lee, J., concurring in part and dissenting in part).

155. See generally Amended Brief for Appellants/Cross-Appellees, *Horton* (No. 91-CA-0006).

156. *Horton*, 667 So. 2d at 1293.

cigarettes outweigh any utility or benefit they might have.¹⁵⁷ However, he contended that the court should not “extend the ‘risk utility’ analysis to situations in which the plaintiff is not required to use a product in order to make a living for himself or family.”¹⁵⁸ Since consumers are not constrained to smoke, the court should not substitute its judgment for that of the consumer, leaving such decisions to the realm of personal choice.¹⁵⁹ The minority opinion did not reach the matter of alternative design.

In conclusion, the prior law of Mississippi is not entirely clear as to the existence of an alternative design requirement in a design defect claim. The court has recognized that the plaintiff may introduce evidence of alternative design in proving defective design. However, the court passed on the opportunity to address any requirement of such proof by failing to address the matter in *Horton*.

b. Feasible Alternative Design Under the Act

The Act requires that the plaintiff prove as a part of her case-in-chief that at the time the product left the manufacturer’s control “there existed a feasible design alternative that would have to a reasonable probability prevented the harm.”¹⁶⁰ The Act defines feasible alternative design as “a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.”¹⁶¹ The requirement that the plaintiff prove the existence of a feasible alternative design appears to represent a change in the law as it has been stated by the Mississippi Supreme Court in its pre-Act opinions by explicitly requiring proof of a feasible alternative design.¹⁶² However, for the most part, the practical effects of an alternative design requirement will not be widely noticed.¹⁶³

(i) Existence of Alternative Design

The Act is not as precise as it could be with reference to the meaning of the existence of an alternative design. The Act merely declares that the plaintiff must prove the alternative design existed at the time the product left the control of the manufacturer. The Act does not qualify further what is intended by the word “existed.” Does an alternative design that has been proposed or conceived,

157. *Id.* at 1294-95.

158. *Id.* at 1295 n.1.

159. *Id.* at 1296. Under the Act, a court could have allowed a fact-finding of defectively designed cigarettes in a *Horton*-type case because of the evidence of additives not required for the product’s function, assuming that plaintiffs could show that the additives caused harm that probably would not have occurred in their absence and assuming that plaintiff could get by the problem of expectation regarding product safety. The Act does not make a distinction between work-related products and other products.

160. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996).

161. *Id.*

162. *But see* Harges, *supra* note 47, at 715-16 (concluding the alternative design requirement is consistent with the state of the art defense as applied in Mississippi before the Act). Even if state of the art were an appropriate defense under the pre-Act law, the Act places the burden of proof of alternative design squarely on the shoulders of the plaintiff.

163. *See* note 128, *supra*. Those cases where the change would be material would be in cigarette cases and other cases involving products where there is no feasible alternative design or where expert testimony might not otherwise be required to support a plaintiff’s case because of the obviousness of the defective design.

but not yet put into production, qualify as an existing alternative design, or must the design be one that is in actual production? The same question has been raised by Professor Thomas Galligan¹⁶⁴ regarding a similar provision in the Louisiana Products Liability Act.¹⁶⁵ He suggests that if the interpretation were to be one that requires actual production, an industry will be left to define its own standard of care.¹⁶⁶ An industry would be free to ignore safer alternative designs that are known to be feasible but not yet in production.

On the other hand, should a court permit the testimony of a witness on behalf of the plaintiff that the witness developed a prototype of an alternative design which existed at the time required by the Act but which was not publicized, was unknown, and was not readily knowable to the defendant manufacturer? From the manufacturer's point of view, such testimony may result in holding the manufacturer liable for failing to adopt an alternative design even though the information regarding such a design was not readily available. In such a case, the manufacturer would be liable without fault for failing to adopt an essentially unavailable design.¹⁶⁷

A very narrow application of the Act's literal language seems to preclude the introduction of evidence that an industry or particular manufacturer reasonably could have developed an alternative design with existing technology and scientific knowledge, but did not do so.¹⁶⁸ Thus, for example, suppose that a manufacturer has produced a new industrial machine, substantially different enough from other existing machines to be differentiated as a separate product category, but similar in certain respects. The manufacturer made the new machine without certain guards to protect workers using the machine. Suppose further that the plaintiff can produce evidence that, applying technology available at the time of manufacture, the manufacturer could have included guards on the machine similar to guards on other similar products. Should the injured plaintiff be barred from offering evidence that guards were technologically and practically feasible under existing knowledge even if no manufacturer or designer has proposed or implemented guards for the new industrial machine?¹⁶⁹ To bar such evidence permits the manufacturer to market new products while ignoring the application of existing technology that would result in improved safety.

The best approach in resolving such issues is for the court to seek a reading of the Act that would allow the plaintiff to prove that an alternative design was in

164. Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of It All*, 49 LA. L. REV. 629, 661-62 (1989).

165. LA. REV. STAT. ANN. § 9:2800.56 (West 1991).

166. Galligan, *supra* note 164, 661-62.

167. Compare LA. REV. STAT. ANN. § 9:2800.59.A (West 1991) ("reasonably available"); ILL. COMP. STAT. § 5/2-2104 ch. 735 (West Supp. 1996) ("available and developed for commercial use and acceptable in the marketplace"); MICH. COMP. LAWS ANN. § 600.2946(2) (West Supp. 1996) ("developed . . . and capable of use . . . and . . . economically feasible"). See also *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1480 (10th Cir. 1993) ("The mere existence of prototypes does not obligate manufacturers to implement such devices in their products.").

168. The FINAL DRAFT appears to allow a plaintiff to present evidence that a reasonable alternative design could have been developed and adopted by the manufacturer, even if such a design had not been adopted by any manufacturer or considered for commercial use. FINAL DRAFT, *supra* note 59, § 2(b) cmt. d.

169. Cf. Galligan, *supra* note 164, at 662-63 (discussing the Louisiana Products Liability Act and the view that the plaintiff need only show an alternative design to be possible or existing at the time of the trial, leaving the defendant to produce evidence that the product was state of the art as a defense).

production, that the design concept was in existence (whether in production or merely proposed) and reasonably available to the manufacturer, or that the design could have been reasonably developed and adopted under existing technology, whether actually conceived or not. Such an approach would protect the manufacturer's interest in being held liable only if at fault in design, but would also protect the consumer from manufacturer's fault in failing to act reasonably to develop improvements to safety within existing technological and practical bounds. In other words, an industry could not reasonably refuse to develop improvements and safeguards without being subject to liability when the practical technology existed to do so.

In any event, the new law is clear that the plaintiff must prove that an alternative design existed at the time the product left the manufacturer's control. If no alternative design exists, a product with a high degree of danger with little or no use or benefit to society is not defectively designed under Mississippi law, even if the manufacturer foresees the danger and the ordinary consumer does not. The only possible claim in such a case would be for failure to warn.¹⁷⁰ Absent proof of an alternative design, a plaintiff cannot contend under the Act that a product was so dangerous that it should not have been placed in the stream of commerce.¹⁷¹

(ii) Feasibility

The feasibility requirement of the alternative design has two elements: (1) The alternative design must not impair "the utility, usefulness, practicality or desirability of the product to users or consumers,"¹⁷² and (2) the plaintiff must show the alternative design probably would have prevented the harm.¹⁷³ Each of these elements will be discussed in turn. A related matter is whether the alternative design proposed is actually a separate product category.

(a) Utility, Practicality, and Desirability

The plaintiff must prove in her *prima facie* case not only the existence of the alternative design but also that the proposed alternative design does not impair the utility, usefulness, practicality or desirability of the product to users or con-

170. See MISS. CODE ANN. § 11-1-63(c) (Supp. 1996).

171. Compare FINAL DRAFT, *supra* note 59, § 2 cmt. d: "The requirement . . . that plaintiff show a reasonable alternative design applies even though plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all." Cf. *Hopkins v. NCR Corp.*, Civ. A. No. 93-188-B-M2, 1994 WL 757510 (M.D. La. 1994 Nov. 17, 1994) (plaintiff was not entitled to recovery on the grounds that she failed to prove existence of an alternative design to a data input device requiring repetitive motion). Nevertheless, the FINAL DRAFT recognizes that "[s]everal courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design." FINAL DRAFT, *supra* note 59, § 2 cmt. d. The literal language of section 2(b) does not support this view; however, the reporters take the position that comment d to section 2 does reflect the view that in rare cases an alternative design need not be presented. FINAL DRAFT, *supra* note 59, § 2 cmt. d, reporter's note, at 68-74, and cmt. e, reporter's note, at 100. Cf. OHIO REV. CODE ANN. § 2307.75(F) (1993) (dispensing with the alternative design requirement when "[t]he manufacturer acted unreasonably in introducing the product into trade or commerce").

172. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996).

173. *Id.*

sumers.¹⁷⁴ Such a requirement is the heart of what may be called the risk-utility analysis in design cases as it now exists in Mississippi.¹⁷⁵ The focus of the risk-utility test in design cases is on the consumer's or user's perspective, not the manufacturer's. Thus, a plaintiff theoretically need not be concerned with the difficulty or inconvenience to the manufacturer of adopting the alternative design, except indirectly to the extent that such matters affect the consumer, such as the price charged to the consumer.¹⁷⁶

The fact finder must determine whether the evidence shows that the alternative design is, in effect, safer and that the increased safety would not cause a decrease in the efficiency or effectiveness of product performance or in the aesthetic appearance (where important); cause an increase in the cost to acquire, maintain, or operate; or have other similar negative effects such that a user or consumer would prefer the alternative design over the design as manufactured by the defendant. In other words, assuming the alternatively designed product would have probably prevented the accident and was thus safer, would the consumer or user prefer the alternative to the product as actually manufactured? If not, the alternative design is not a feasible design under the Act and the defendant would prevail. If the answer is yes, the plaintiff would succeed as to this element in the burden of proof.

The Act does not expressly qualify the requirement that the alternative design proposed by the plaintiff must not impair the utility, practicality, or desirability of the product.¹⁷⁷ The Act does not state the degree of permissible impairment. One could interpret the provision literally to mean that any impairment, however slight, would bar a finding of feasible alternative design.

In contrast, the Act provides, as to a claim involving a product with "an inherent characteristic which is a generic characteristic aspect of the product," that the manufacturer is not liable if that characteristic "cannot be eliminated without substantially compromising the product's usefulness or desirability"¹⁷⁸ Thus, if the generic characteristic can be eliminated without a significant decrease in utility or desirability of the product, the manufacturer may be liable for failing to do so.

174. *Id.*

175. The Mississippi approach is similar to the approach taken in the FINAL DRAFT, *supra* note 59, § 2 cmt. d.: "[T]he test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design rendered the product not reasonably safe." The Mississippi test is more specific, and perhaps more limiting, compared to the Final Draft in that in Mississippi the design must be evaluated from the consumer's or user's perspective. The alternative design requirement of the Final Draft has been much criticized as going too far in restricting plaintiff's ability to show that a product is unreasonably dangerous. See, e.g., Shapo, *supra* note 132, at 660-64, 668-77 (criticizing an earlier draft version). The alternative design requirement has been defended just as vigorously. See, e.g., Henderson & Twerski, *supra* note 146, at 1301-14; Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warning Decisions*, 36 S. TEX. L. REV. 283, 339-49 (1995).

176. Compare this approach to the Louisiana Products Liability Act which allows consideration of the "burden on the manufacturer of adopting" plaintiff's alternative design as a factor in the weighing of the alternative design against the defendant's design. LA. REV. STAT. ANN. § 9:2800.56(2) (West 1991).

177. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996).

178. MISS. CODE ANN. § 11-1-63(b) (Supp. 1996).

This author suggests that the two provisions of the Act concerning the degree of permissible impairment of a product's usefulness or desirability must be applied consistently in order to give rational application to both sections of the Act. The feasible alternative design requirement must be understood to mean that the plaintiff's alternative design proposal cannot *significantly* impair the product's usefulness or desirability.¹⁷⁹ A slight impairment of function or desirability posed by an alternative design should not bar the claim on the basis of such an impairment. To interpret this requirement otherwise would result effectively in reading out of the Act the language qualifying the extent of permissible impairment in the section of the Act dealing with inherent characteristics.¹⁸⁰ In inherent characteristic cases, a manufacturer would simply rely on the feasible alternative design requirement which literally forbids any impairment at all.¹⁸¹ The legislature could not have intended such an irrational result.

Another potential problem is the identification of the consumer or user of a product in an industrial or commercial business setting. The consumer or user could be considered the corporate purchaser of a piece of industrial equipment or the workers employed to use the equipment by the purchaser. In such an event, is the product design which caused the harm to be evaluated from the view of the corporation which owns the equipment or the view of the employee who uses the equipment? The viewpoint may be significant in evaluating an alternative design's utility, practicality, or desirability.

The worker is indirectly concerned with the employer's bottom line because of the effect on the existence of the worker's job and rate of compensation, but the worker may well value the utility, practicality, or desirability of an item of equipment differently from his employer. The worker may be concerned more with his individual safety than the effect on the employer's profits. Although costs of worker's compensation and other matters relating to employee welfare may affect the employer-owner's view of utility, practicality, or desirability of a piece of industrial equipment, the determining factors are likely to be different from the employees who use the equipment. Thus, the determination of whose perspective is to be used in evaluating industrial or commercial equipment may make a significant difference in the outcome of whether an alternative design is feasible under the Act.¹⁸²

The most likely interpretation of "user or consumer" under the alternative design requirement is that these terms refer to both the persons who actually use

179. Compare ILL. COMP. STAT. 5/2-2104 ch. 735 (West Supp. 1996) (providing that the proposed alternative design "would have prevented the harm without significantly impairing the usefulness, desirability, or marketability of the product").

180. MISS. CODE ANN. § 11-1-63 (Supp. 1996).

181. See *infra* text accompanying notes 196-197 (concluding that section (b) of the Act dealing with inherent characteristics is not necessary because it is duplicative of the feasible alternative design requirement).

182. Similar issues exist for products designed and marketed for children, the patients of medical professionals, and bystanders. The status of bystanders is considered in PART I, *supra* note 2, at 425-26, 434-35.

or consume the product as well as to the owner.¹⁸³ Such an approach would be consistent with the usage and practice under Section 402A. Comment 1 to Section 402A states that those who prepare food for consumption as well as those who actually consume it are included as “consumers.”¹⁸⁴ “Users” includes employees who repair a product for the owner.¹⁸⁵ The Act gives no indication that the legislature intended to change the understanding of these terms in evaluating claims of design defects.

(b) Reasonable Probability

In addition to showing that the alternative design would not impair the utility, practicality, or desirability of the product, the plaintiff must show that the alternative design “would have to a reasonable probability prevented the harm.”¹⁸⁶ Presumably, this means that the alternative design would more probably than not have prevented or reduced the harm. The focus of any interpretation of this requirement is on the words “reasonable probability” and “would . . . have prevented the harm.”

Unfortunately the term “reasonable probability” is ambiguous, having various meanings in different legal contexts. For example, in the context of ineffective representation by counsel in criminal cases, the term “reasonable probability” does not mean “more likely than not,” but simply “probability sufficient to undermine confidence in the outcome.”¹⁸⁷ In other contexts, such as the burden of proof of causation in a civil case, “reasonable probability” has been interpreted as meaning “more likely than not” or “more probably than not.”¹⁸⁸ In the context of the Act, the language should be interpreted as meaning “more probably than not” rather than merely a significant possibility. The legislature likely did not intend the plaintiff to have a lesser burden of proof than the traditional preponderance of the evidence rule.

The phrase “would . . . have prevented the harm” is similarly not as clear as it might have been. Literally read, a plaintiff could recover only if she proves that no harm would have befallen her had she used the alternative design. Such an interpretation should not be adopted. A preferable reading is one that takes the

183. In cases involving children's products, the viewpoint of parent or other adult supervisor is the relevant viewpoint. *Todd v. Societe BIC, S.A.*, 21 F.3d 1402, 1407-08 (7th Cir. 1994), (applying Illinois law); *Bellotte v. Zayre Corp.*, 352 A.2d 723, 725 (N.H. 1976). As to a patient, the viewpoint may be that of the patient. *Cf. V. Mueller & Co. v. Corley*, 570 S.W.2d 140, 145 (Tex. Civ. App. 1978). *But see Rosburg v. Minnesota Mining & Mfg. Co.*, 226 Cal. Rpt. 299, 304 (Cal. App. Ct. 1986).

184. RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. 1 (1965).

185. *Id.*

186. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996).

187. *Stickland v. Washington*, 466 U.S. 668, 693-94 (1984). *Cf. Wilcher v. State*, 455 So. 2d 727, 736 (Miss. 1984), (a “reasonable probability of innocence” requires a verdict of acquittal even though the theory of guilt is more reasonable than the theory of innocence); *Quinn v. Southern Pac. Transp. Co.*, 711 P.2d 139 (Ariz. 1985) (distinguishing between “more probable than not” and reasonable probability as test for impermissible discrimination against a handicapped applicant for employment).

188. *See, e.g., Merrell Dow Pharm., Inc. v. Havner*, 907 S.W.2d 535, 543 (Tex. Civ. App. 1995) (involving proof of causation in a civil tort claim). *Cf. Monsanto Chem. Co. v. Sykes*, 147 So. 2d 290, 295 (Miss. 1962) (equating “reasonable probability” with “probably” in a case involving proof that oil wells produce in paying quantities).

Act to mean that the plaintiff must show that the alternative design would have reduced or prevented the harm.¹⁸⁹ Put somewhat differently, the plaintiff should be required to show only that the alternative design would have prevented the harm from occurring to the same extent and degree.¹⁹⁰ The plaintiff should not be required to prove the existence of an absolutely safe alternative design any more than the manufacturer should be required to produce an absolutely safe product. A product should be reasonably safe, or as safe as is practical and feasible.¹⁹¹ Thus, a consumer or user should be entitled to expect a product's design to reduce the degree or extent of harm to the extent practical and feasible if such harm cannot be feasibly and practically eliminated. Too narrow a reading of the word "prevented" would be manifestly unjust and unnecessary.

(c) Alternative Design or Alternative Product

The problem of distinguishing a different product category from an alternative design of the defendant's product arises in connection with the alternative design requirement. The difference between alternative design and alternative product is one of degree.¹⁹² For example, a bicycle is clearly a different product from a tricycle. A riding lawnmower is a different product from a push model mower, even though they perform similar functions in cutting grass. However, is a car equipped with an airbag restraint system a different product from a car equipped only with seatbelts?¹⁹³ Professor Galligan, in addressing a similar problem with the Louisiana Products Liability Act, suggests that the courts should not apply the requirement of alternative design too narrowly.¹⁹⁴ The focus should be on the function and purpose of the designs in question.

Professors Henderson and Twerski have suggested that distinguishing a marginal design variation within a product category from a different product category is a fact question for the fact finder to resolve by focusing on the substitutability of the alternative proposed by the plaintiff for the defendant's product.¹⁹⁵ Nevertheless, the court likely will be required to make a preliminary determination in some cases as to whether the plaintiff's design should be submitted to the jury as an alternative design or whether it should not be submitted because the proposed design results in a clearly different product.

189. The same solution has been proposed for a similar problem created by the language of the Louisiana Products Liability Act, § 2800.56(1). Galligan, *supra* note 164, at 664-65. The FINAL DRAFT, *supra* note 59, § 2(b), labels a product defectively designed if the reasonable alternative design could have "reduced or avoided" the foreseeable risks of harm and the product as designed is not reasonably safe.

190. See Galligan, *supra* note 164, at 665.

191. Cf. *Hall v. Mississippi Chem. Express*, 528 So. 2d 796, 800 (Miss. 1988).

192. Galligan, *supra* note 164, at 664.

193. Galligan, *supra* note 164, at 664.

194. Galligan, *supra* note 163, at 664.

195. Henderson & Twerski, *supra* note 146, at 1263; FINAL DRAFT, *supra* note 59, § 2 cmt. e (stating that "[i]n large part the problem is one of how the range of relevant alternative designs is manifested.").

(iii) Inherent Characteristics that Are Generic

Related to the issue of alternative design is the provision of the Act that bars recovery for injuries for defective design or formulation caused by "an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability" and which is commonly known by ordinary persons.¹⁹⁶ In light of the requirement of proof of a feasible alternative design, this "generic aspect" provision of the Act seems to be superfluous. In a case where no design alternative could prevent or reduce the harm without impairing the product's utility or desirability, the product is not defectively designed, whether the design characteristic of the product creating the risk of harm is a generic aspect of the product or not.¹⁹⁷ The feasible alternative design requirement would bar any design claim involving a product with a dangerous characteristic that cannot be avoided or reduced without impairing the product's utility or desirability, without regard to the "generic aspect" provision of the statute.

B. Warnings or Instructions Defect

1. The Duty to Warn at the Time of Sale

In a warnings or instruction defect claim, under the Act, a plaintiff must prove that (1) the manufacturer failed adequately to warn or instruct regarding a danger associated with the product of which the manufacturer knew or should have known in light of reasonably available knowledge at the time the product left the manufacturer's control;¹⁹⁸ (2) the danger was one that an ordinary consumer would not realize;¹⁹⁹ (3) the danger was unreasonable;²⁰⁰ and (4) the danger caused the plaintiff's harm.²⁰¹ The Act provides that an adequate warning is one that

a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the charac-

196. MISS. CODE ANN. § 11-1-63(b) (Supp. 1996). The language of the Act is nearly identical to an Illinois provision dealing with inherent characteristics of products. ILL. COMP. STAT. § 5/2-2106.5 ch. 735 (West 1996). The Illinois version provides:

In a product liability action, a manufacturer or product seller shall not be liable for harm allegedly caused by a product if the alleged harm was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

Id. Illinois also has a feasible alternative design requirement. ILL. COMP. STAT. 5/2-2104 CH. 735 (West 1996).

197. Compare FINAL DRAFT, *supra* note 59, § 2 cmt. d (stating that absent proof of a defect by means of alternative design in design cases, or a defect in warnings or manufacture, "courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm." Instead, courts have left responsibility related to the availability of the products to the legislature and administrative agencies.) Under the approach of the FINAL DRAFT, there is no need to single out "generic aspects" of a product for special treatment. The alternative design requirement covers such products.

198. MISS. CODE ANN. § 11-1-63(c)(i) (Supp. 1996).

199. *Id.*

200. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1996).

201. MISS. CODE ANN. § 11-1-63(a)(iii) (Supp. 1996).

teristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product.²⁰²

However, as to a "prescription drug, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person,"²⁰³ adequacy of the warning is to be evaluated by taking into account "the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product."²⁰⁴

The Act continues the negligence based approach in warnings cases that the courts have followed since adopting Section 402A. Commentators have consistently recognized that strict liability, as applied by the vast majority of courts to warnings, is indistinguishable from traditional negligence theory.²⁰⁵ In general, courts, including Mississippi courts, have not imputed knowledge to the manufacturer of dangers that were not reasonably foreseeable or knowable.²⁰⁶

The Mississippi Supreme Court, moreover, has stated that a manufacturer need not warn of open and obvious defects.²⁰⁷ Even though the court made this pronouncement in a negligence case prior to the adoption of strict liability theory in products liability cases, federal courts applying Mississippi law have continued to apply the open and obvious rule in warnings cases after the adoption of Section 402A.²⁰⁸

Nevertheless, some doubt exists as to the efficacy of an open and obvious defense under the law prior to the Act in light of the court's pronouncement in *Prestage* that Mississippi had adopted a risk-utility analysis in 1988.²⁰⁹ The Mississippi Supreme Court has stated that under the risk-utility test, the open and obvious defense does not bar recovery under either negligence theory or strict liability theory in a products liability action.²¹⁰ The court has not faced a warnings case since its abolition of the open and obvious defense as a complete bar to recovery in a products liability case. One could certainly argue that in a risk-utility warnings case, given the rather absolutist language of the court in rejecting

202. MISS. CODE ANN. § 11-1-63(c)(ii) (Supp. 1996).

203. *Id.*

204. *Id.*

205. See, e.g., Mark M. Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law Is Wrong*, 61 TENN. L. REV. 1125, 1130 (1994), 1 M. STUART MADDEN, PRODUCTS LIABILITY § 10.3, at 377 (2d ed. 1988) [hereinafter MADDEN]. Some courts have expressly reached this same conclusion. E.g., *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) ("[A]ny posited distinction between strict liability and negligence principles [in warnings cases] is illusory").

206. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1320 (5th Cir. 1985) (applying Mississippi law); *Wyeth Labs., Inc. v. Fortenberry*, 530 So. 2d 688, 691 (Miss. 1988) (drug manufacturer has a duty to warn of "any known adverse effects"). See also, MADDEN, *supra* note 205, § 10.3, at 377-79.

207. *Harrist v. Spencer-Harris Tool Co.*, 140 So. 2d 558, 562 (Miss. 1962).

208. *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 811 (5th Cir. 1992), *cert. denied*, 504 U.S. 956 (1992); *Lenoir v. C.O. Porter Mach. Co.*, 672 F.2d 1240, 1244 (5th Cir. 1982). This approach is in line with the clear majority rule. See MADDEN, *supra* note 205, § 10.5, at 387; FINAL DRAFT, *supra* note 59, § 2 cmt. i, reporter's note, at 111.

209. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 (Miss. 1993).

210. *Id.* at 256; *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 895 (Miss. 1995); *Materials Transp. Co. v. Newman*, 656 So. 2d 1199, 1203 (Miss. 1995).

the defense as a complete bar,²¹¹ the open and obvious danger of the product should not bar recovery in a warnings defect case. Rather, the open and obvious danger simply should be regarded as one factor in the evaluation of the unreasonably defective condition of the product. However, such an argument has not been the generally accepted view, even where risk-utility has been adopted as the appropriate approach to design defect.²¹²

Regardless of any doubts that may linger as to the pre-Act law, the current law is clear that the manufacturer need not warn of a dangerous condition that the ordinary consumer "would . . . realize."²¹³ However, the manufacturer is liable for failure to warn of dangers foreseeable to the manufacturer but not obvious to the ordinary users or consumers.²¹⁴ This approach places Mississippi squarely in accord with the majority rule and with the approach taken by the Final Draft.²¹⁵

The Act's provisions for evaluation of the adequacy of a warning or instruction appear to be consistent with the law prior to the Act. Under the Act, the adequacy of a disputed warning or instruction is to be evaluated in light of an instruction or warning that "a reasonably prudent person in the same or similar circumstances would have provided" as to the safe use of the product and the danger of its use, considering "the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the products."²¹⁶ Under prior law, adequate warning was defined as one that is "reasonable under the circumstances."²¹⁷

The Act specifically incorporates a learned intermediary rule²¹⁸ with respect to warnings and instructions for prescription drugs, medical devices, and other products intended to be used only under the supervision of a licensed professional.²¹⁹ The statutory adoption of the learned intermediary rule is consistent with prior law,²²⁰ although the rule is not limited in Mississippi to licensed profession-

211. See *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 895 (Miss. 1995). The court stated that, "the current state of our tort law is that the open and obvious defense is simply a factor and not a complete bar in our jurisdiction applying comparative negligence principles." *Id.*

212. See FINAL DRAFT, *supra* note 59, § 2 cmt. j, reporter's note, at 108.

213. MISS. CODE ANN. § 11-1-63(c)(i) (Supp. 1996).

214. The concept of foreseeability (what the manufacturer knew or should have known in light of reasonably available knowledge) should include dangers that reasonable pre-marketing testing would indicate. See FINAL DRAFT, *supra* notes 59, § 2 cmt. m.

215. FINAL DRAFT, *supra* note 59 § 2 cmt. i ("[W]arnings . . . should inform users and consumers of nonobvious risks that unavoidably inhere in using or consuming the product.") and cmt. j ("In general, a product seller is not subject to liability for failure to warn or instruct regarding risks and risk avoidance measures that should be obvious to, or generally known by, foreseeable product users.").

216. MISS. CODE ANN. § 11-1-63(c)(ii) (Supp. 1996). The approach of the Final Draft is similar. See FINAL DRAFT, *supra* note 59, § 2 cmts. i, j and k.

217. *Wyeth Labs., Inc. v. Fortenberry*, 530 So. 2d 688, 692 (Miss. 1988).

218. The learned intermediary doctrine permits the manufacturer under some circumstances to warn a learned intermediary, such a medical professional, who supplies or supervises the use or consumption of the product by the ultimate user or consumer. The manufacturer may rely on the intermediary, where such reliance is reasonable, to appropriately instruct or warn the ultimate user or consumer. See *Swan v. I.P., Inc.*, 613 So. 2d 846, 855-56 (Miss. 1993); *Wyeth Labs.*, 530 So. 2d at 691-92.

219. MISS. CODE ANN. § 11-1-63(c)(ii) (Supp. 1996).

220. *Thomas v. Hoffman-LaRoche*, 949 F.2d 806, 811 (5th Cir. 1992); *Cather v. Catheter Tech. Corp.*, 753 F. Supp. 634 (W.D. Miss. 1991); *Wyeth Labs.*, 530 So. 2d at 691-92.

als such as physicians²²¹ The Act, while containing specific provisions as to licensed professionals, does not appear to abrogate the learned intermediary doctrine with respect to other types of intermediaries, because the totality of the circumstances is to be considered in evaluation of a warning's or instruction's adequacy with respect to any product.²²²

Under the law prior to the Act, the scope of the duty to warn included an evaluation of whether, under the circumstances, a warning to the purchaser such as an employer, rather than directly to the employee-user, was sufficient.²²³ Since the Act requires the consideration of the "characteristics" of the purchaser, the question of whether the purchaser is likely to pass on warnings or instructions to users or consumers would remain an issue for consideration as under the prior law. The fact that the purchaser may have knowledge of the proper use and the dangers of the product is not in and of itself sufficient to relieve the manufacturer of a duty to warn the ultimate user or consumer.²²⁴ Reliance on the purchaser to pass on information and warnings to the ultimate user must be reasonable.²²⁵

Under the law prior to the Act in a warnings claim, the plaintiff had the burden of proving that she would have read and heeded a warning, had it been given by the manufacturer.²²⁶ Absent such proof, the plaintiff could not succeed in establishing causation from inadequate warnings. Under pre-Act Mississippi law as applied by the Fifth Circuit, the plaintiff was not entitled to a presumption that the plaintiff would have read and heeded the warnings.²²⁷

The Act, however, could be interpreted as leaving the question of a rebuttable presumption open to development by the courts. A presumption that the plaintiff would have read and heeded an adequate warning has gained widespread approval in the courts, in part because it avoids the need for speculative testimony from the plaintiff about whether she would have heeded a warning.²²⁸ Since the Mississippi Supreme Court has never addressed the issue of whether a plaintiff is entitled to a rebuttable presumption as a part of her proof of causation, the matter remains undecided. If the Mississippi Supreme Court were to decide that as a method of proof, the plaintiff is entitled to a judicially-adopted rebuttable presumption that she would have read and heeded an adequate warning, the Act

221. See *Swan*, 613 So. 2d at 856 (discussing the doctrine in a claim against the manufacturer of a roofing product).

222. MISS. CODE ANN. § 11-1-63(c)(ii) (Supp. 1996). Moreover, the Act's language is sufficiently broad to allow warnings to be directed to appropriate intermediaries such as parents of young children or others where communication with the ultimate consumer or user would be inappropriate or impractical and reliance on such intermediaries is reasonable. This approach is in accord with the general rule in American courts. See MADDEN, *supra* note 205, § 10.9, at 420-21.

223. *Gordon v. Niagara Mach. & Tool Works*, 574 F.2d 1182, 1188-89 (5th Cir. 1978) (applying Mississippi law); *Swan*, 613 So. 2d at 855-56.

224. *Little v. Liquid Air Corp.*, 952 F.2d 841, 850-51 (5th Cir. 1992) (applying Miss. law); *Swan*, 613 So. 2d at 855-56.

225. *Swan*, 613 So. 2d at 856.

226. *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 812-13 (5th Cir. 1992) (applying Mississippi law).

227. *Id.* In *Thomas*, the court found that the failure to mention any such presumption in a similar case by the Mississippi Supreme Court created a strong inference that no such presumption exists under Mississippi law. *Id.* However, the court did not rule out the possibility that in the type of warnings case where the proposed warning would have addressed safe use as opposed to unavoidable risks, a rebuttable presumption may apply. *Id.* at 813-14.

228. MADDEN, *supra* note 205, § 10.7, at 405.

would not prohibit such proof. The Act merely requires that the plaintiff prove proximate causation by a preponderance of the evidence; it does not specify the method of such proof.²²⁹

2. Post-Sale Duty to Warn

Courts in the United States have come to recognize that under some circumstances, a duty to warn exists as to dangers existing at the point of transfer of control from the manufacturer or seller but not discovered, regardless of fault, until after the transfer of control from the manufacturer or seller.²³⁰ The Final Draft adopts this approach, recognizing a post-sale duty to warn after the time of sale "when a reasonable person . . . would provide such a warning."²³¹ The Mississippi Supreme Court has never addressed this issue nor have any federal courts applying Mississippi law.

Because the Act deals only with dangers foreseeable at the time the product left the control of the manufacturer or seller, it seems to preclude the development of a post-sale duty to warn doctrine in Mississippi. This author suggests that the legislature consider adopting a reasonable post-sale duty to warn doctrine similar to or based on the Final Draft. Such a doctrine would not impose an unreasonable duty on manufacturers, if appropriately circumscribed, but would result in dissemination of potentially important and life-saving information to Mississippi consumers.

C. Deviation Defect

Under the Act, liability for a deviation defect²³² is strict. The Act provides that the plaintiff must show, in addition to causation,²³³ that at the time the product left the control of the manufacturer or seller,²³⁴ "[t]he product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications,"²³⁵ and that the defect was unreasonably dangerous to the user or consumer.²³⁶ In contrast to design or warning defects, the Act does not require proof

229. MISS. CODE ANN. § 11-1-63(a)(iii) (Supp. 1996).

230. *E.g.*, *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1344 (Kan. 1993).

231. FINAL DRAFT, *supra* note 59, § 10. *See also id.*, §§ 10 and 11 (dealing with successor corporations' and commercial sellers' duty of post-sale warning). *Compare* LA. REV. STAT. ANN. § 9:2800.57C (West 1991) (requiring reasonable care in providing warnings of danger discovered or which should have been discovered after the product leaves the manufacturer's control). *Compare also* N.J. STAT. ANN. § 2A:58C-4 (West 1987); OHIO REV. CODE ANN. § 2307.7(A)(2) (Banks-Baldwin 1994).

232. This type of defect has traditionally been referred to as a "manufacturing defect." However, this Article uses the term "deviation defect" since the scope of the defect considered under this theory is broader than defects that may occur just in the manufacturing stage. Deviation defects may occur at any point from manufacturing through the distribution stages prior to final transfer from a commercial distributor to a user or consumer. *See* FINAL DRAFT, *supra* note 59, § 2 cmt. b.

233. MISS. CODE ANN. § 11-1-63(a)(iii) (Supp. 1996).

234. MISS. CODE ANN. § 11-1-63(a) (Supp. 1996).

235. MISS. CODE ANN. § 11-1-63(a)(i)(1) (Supp. 1996).

236. MISS. CODE ANN. § 11-1-63(a)(iii) (Supp. 1996).

that the manufacturer or seller knew or should have known of the danger that caused the harm.²³⁷ Fault in creating a deviation defect is irrelevant.

The deviation defect must be shown by the plaintiff to be "material."²³⁸ The word "material" is not defined, but presumably the defect must be a deviation that would affect product function or performance in a way that would cause the product to present an unreasonable risk of harm²³⁹ not otherwise present in the product produced according to manufacturer specifications. A claimant injured by a product with a deviation that is found not to be material may alternatively seek recovery under a design defect theory or a warnings defect theory on the grounds that the product is unreasonably dangerous as designed or in the absence of appropriate warnings.

The Act probably makes no change from the approach taken by the Mississippi Supreme Court in applying Section 402A to deviation defects. The Act codifies the prior rule that manufacturers, and probably sellers, are strictly liable for an unreasonably dangerous deviation defect that causes harm to a user or consumer.²⁴⁰ Because of its exclusive nature, however, the Act appears to eliminate negligence as an alternative theory of liability, although facts that would support a finding of negligence would certainly be sufficient to prove a claim for deviation defect under the Act.²⁴¹ Nevertheless, proof of manufacturer or seller fault in creating a deviation defect would be necessary in a claim for punitive damages.²⁴² Under previous law, the plaintiff was free to allege alternative theories of negligence or strict liability in a products liability case.²⁴³

D. Breach of Express Warranty

Under the Act, liability for breach of an express warranty or failure of the product to conform with an express factual representation, like liability for deviation defect, is strict; i.e., the plaintiff need prove only that the breach or misrepresentation caused the harm, without having to prove fault leading to the breach or misrepresentation.²⁴⁴ The term "express warranty" is not defined by the statute.

237. MISS. CODE ANN. § 11-1-63(c)(i), (f)(ii) (Supp. 1996).

238. MISS. CODE ANN. § 11-1-63(a)(i)(1) (Supp. 1996).

239. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1996).

240. See *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966) (manufacturers are strictly liable under Section 402A); *Scordino v. Hopeman Bros., Inc.*, 662 So. 2d 640, 646 (Miss. 1995) (dicta indicating that sellers are strictly liable under 402A). See also PART I, *supra* note 2, at 420-22, for a discussion of strict liability under Section 402A as applied to non-manufacturer sellers. See *infra* text at notes 257-282 for a discussion of ambiguities in the Act's language pertaining to manufacturer and seller liability.

241. But see *Taylor v. General Motors Corp.*, 1996 WL 671648 (N.D. Miss., Aug. 6, 1996) ("The court finds that after examining House Bill 1270, rules of construction, and the object and policy behind the Act, the legislature did not intend to abrogate the long established common law theory of negligence or the statutory cause of action for breach of implied warranty."). For further discussion of *Taylor* and whether the Act is the exclusive basis of product liability claims, see note 249, *infra*, and PART I, *supra* note 2, at 394.

242. See MISS. CODE ANN. § 11-1-65 (1)(a) and (g) (Supp. 1996) (requiring clear and convincing evidence of actual malice, gross negligence, or fraud).

243. See *Toliver v. General Motors Corp.*, 482 So. 2d 213, 215 (Miss. 1985).

244. MISS. CODE ANN. § 11-1-63(a)(i)(4) (Supp. 1996).

Presumably the concept, as used in the Act, will be identical to "express warranty" as provided by Mississippi's version of the Uniform Commercial Code.²⁴⁵

Under the language providing for liability if the product fails "to conform to other express factual representations,"²⁴⁶ the plaintiff could assert a claim based on express factual representations given by the manufacturer or seller that would not qualify as an express warranty. In other words, representations that would not qualify as a part of the "basis of the bargain" may provide a basis for a claim. For example, a representation about the product by a manufacturer made to the consumer after the sale may form the basis of a claim under this provision in situations where the representation does not relate back to and become a part of the contract of sale. Also, the provision reaches representations made prior to a sale that might not qualify as express warranties. This provision appears to represent an adoption of a principle similar to that set forth in Section 402B of the Restatement (Second) of Torts²⁴⁷ providing for strict liability for physical damages caused by misrepresentation to the public reasonably relied upon by a consumer or user. However, the recovery for misrepresentation in Mississippi is not limited only to public representations. Representations made directly to the consumer or user by private communications are sufficient to support a claim.

In order to recover under a claim of breach of warranty or misrepresentation, the plaintiff must prove both that she relied on the warranty or representation and that the reliance was reasonable.²⁴⁸ Insofar as express warranties are concerned, the reliance requirement may or may not represent a change in Mississippi law.²⁴⁹ In any event, the reliance requirement is consistent with the historical view, if not the modern view.²⁵⁰ The reliance issue presents problems for users who are

245. MISS. CODE ANN. § 75-2-313 (1972). Under this statute:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Id.

246. MISS. CODE ANN. § 11-1-63(a)(i)(4) (Supp. 1996).

247. RESTATEMENT (SECOND) OF TORTS, § 402B (1965) provides the following:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS, § 402B (1965). The Act, unlike Section 402B imposes an "unreasonably dangerous" requirement, however. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1996). See *infra* text accompanying notes 255-57.

248. MISS. CODE ANN. § 11-1-63(a)(i)(4) (Supp. 1996).

249. See PART I, *supra* note 2, at 397, 424 n.281.

250. MADDEN, *supra* note 205, § 2.10, at 37.

unaware of the manufacturer's express warranty, such as employees of the product purchaser, or family members of the product purchasers. In such cases, a remedy must be based on another theory of defect.²⁵¹

While the word "defect" or "defective" does not appear in the provision establishing breach of warranty or misrepresentation as a basis of a products liability claim, the Act appears to treat a breach of express warranty or misrepresentation as a "defective condition."²⁵² The Act requires the plaintiff to prove under any theory of liability provided by the Act that the "defective condition rendered the product unreasonably dangerous."²⁵³ This additional requirement represents a

251. As shown in PART I the possibility exists that such persons could not sue on the basis of an implied warranty either, since the Act purports to govern all claims for damages caused by products and implied warranties are omitted as basis for a products liability claim. PART I, *supra* note 2, at 394, 424. If so, the practical effects of the abolition of a privity requirement, see MISS. CODE ANN. § 11-7-20, are mostly lost. Indeed, in *Rogers v. Elk River Safety Belt Co.*, No. CIV. 1:95CV115-D.D., 1996 WL 671316 at *3 (N.D. Miss. Sept. 20, 1996) (rendered after the completion of *Part I*), the court, on motion for summary judgment, dismissed the plaintiff's product liability claim based on a theory of implied warranty "[b]ecause the statute does not provide for recovery for breach of implied warranty." *Cf. Satcher v. Honda Motor Co.*, 855 F. Supp. 886, 890-91 (S.D. Miss. 1994), *cert. denied*, 116 S.Ct. 705 (1996) ("If House Bill 1270 was merely a codification of existing law immediately pre-*Prestage*, . . . the legislature would have no reason to delay the effect of the substantive portions of the bill . . . until . . . more than a year after its adoption. House Bill 1270 does not merely codify [the] law as it existed prior to *Prestage*. It substantially changed the law."). *Cf.*, *Taylor v. General Motors Corp.*, 1996 WL 671648 (N.D. Miss. Aug. 6, 1996) ("The court finds that after examining House Bill 1270, rules of construction, and the object and policy behind the Act, the legislature did not intend to abrogate the long established common law theory of negligence or the statutory cause of action for breach of implied warranty."). This author respectfully disagrees with Judge Biggers on the issue of negligence. It seems clear that the legislature intended the statute to consolidate theories of products liability, actually doing away with true strict liability except in instances of deviation defects and breaches of express warranty. The statute abolishes the traditional distinction between strict liability (imputed knowledge of danger) and negligence (knew or should have known of the danger) in design cases in favor of a unified approach to products liability cases based on a negligence-oriented approach in design and warnings cases. See *supra* text accompanying notes 50-56 (discussing defects) and notes 198-229 (discussing warning defects). Thus, negligence as a separate theory of liability would serve little use in design cases or warnings cases. The statute never uses the terms "negligence" or "strict liability," an indication that the legislature intended the Act to cover all prior theories of products liability claims. Moreover, the legislature makes complete defenses of open and obvious danger of a defect, at least as to warnings cases, see *infra* text accompanying notes 286-91, and assumption of the risk, see *infra* text accompanying notes 303-18. To allow these defenses as complete bars in actions under the Act but not under alternative theories outside of the Act's coverage would be anomalous. Under a negligence action, if such survives outside of the coverage of the Act, an open and obvious defense would only reduce recovery. See *Seymour v. Brunswick*, 655 So. 2d 892, 894 (Miss. 1995); *Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss. 1994). Assumption of the risk is likely to be absorbed into comparative negligence. See *Horton v. American Tobacco Corp.*, 667 So. 2d 1289, 1292, 1306 (Miss. 1995). The legislature clearly intends open and obvious danger (in warnings cases) and assumption of the risk to remain as a separate and complete defense in products liability actions. Moreover, if the consumer expectations test is revived in design cases under the Act, an open and obvious danger stands as a bar to the plaintiffs claim. See *supra* text accompanying notes 95-115 and *infra* text accompanying notes 300-02. Under Judge Bigger's view, the plaintiff could succeed in recovery in a negligence action but not in an action under the Act for the same injury. The legislature is unlikely to have intended such a result. As to the continued viability of implied warranty, there is room for greater doubt as to the legislative intent given the problems created by the statute as to implied warranty theory, especially to the extent that interests traditionally provided protection are denied such protection. See PART I, *supra* note 2, at 423-24. Even as to implied warranty, however, there seems to be little reason for the legislature to seek to restrict the application of strict liability in design cases only to have strict liability remain in implied warranty cases. But *cf. Denny v. Ford Motor Co.*, 662 N.E.2d 730, 739 (N.Y. 1995) (holding that even if there is no alternative design available, thus barring a common law tort claim in strict products liability, an implied warranty action may lie).

252. MISS. CODE ANN. § 11-1-63(a)(ii), (iii) (Supp. 1996).

253. MISS. CODE ANN. § 11-1-63(a)(ii) (Supp. 1996).

change in the law. Under the prior law, the plaintiff was not required to show the product was unreasonably dangerous in a breach of warranty claim.²⁵⁴

As discussed in *Part I* of this article, the Act does not define the term "unreasonably dangerous."²⁵⁵ Depending on the category of defect asserted, the definition appears to vary somewhat. For design defect claims, proof of the availability of an alternative design and proof of consumer expectations are mandatory elements in deciding whether a product is unreasonably dangerous.²⁵⁶ In breach of express warranty or misrepresentation cases, the availability of alternative design is not a consideration. The appropriate analysis in a warranty claim requires a determination of whether a reasonable person would have relied on the representation and, if so, whether the breach or misrepresentation created a risk of harm to the user or consumer that a reasonable consumer or user would have chosen not to encounter had she had full knowledge or been given the correct information. The liability is strict because foreseeability of the danger created by the breach of the warranty or the misrepresentation is not a requirement of the plaintiff's case.

III. MANUFACTURER/SELLER DISTINCTION: WHO IS LIABLE FOR WHAT?

One of the most perplexing ambiguities created by the Act's language is whether the nonmanufacturer seller is liable for design or warning defects existing in a product prior to the product's coming into the seller's control when the defect is not known or reasonably knowable to the seller. Professor Harges has suggested that the language merely makes the seller strictly liable for an unreasonably dangerous defect (whether one of deviation, design, warning, or warranty) that exists before the product leaves the seller's control.²⁵⁷ However, the language of the Act is sufficiently ambiguous to create doubt that sellers are strictly liable for design and warnings defects. Even as to deviation defects and breaches of express warranty, some ambiguity exists.

Under Section 402A, the seller is liable if the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."²⁵⁸ Thus, if the condition of the product changes after it leaves the control of a particular seller in the chain of distribution, that seller is not liable for any defect resulting from the change. For example, if a change in a product's condition occurs causing the product to be unreasonably dangerous while the product is in the control of the wholesaler, both the wholesaler and the retailer who later sells the product are liable to the injured user or consumer. The manufacturer, however, would not be liable for the defective condition caused by the change occurring while the wholesaler had control of the product.²⁵⁹

254. Harges, *supra* note 47, at 725, 728.

255. PART I, *supra* note 2, at 431-36 (discussing how the term might be interpreted and applied to users, bystanders and property).

256. MISS. CODE ANN. § 11-1-63(f)(i), (ii) (Supp. 1996). See also *supra* text accompanying notes 1601-64, (feasible alternative design) and notes 76-85 (consumer expectations).

257. Harges, *supra* note 47, at 707-09.

258. RESTATEMENT (SECOND) OF TORTS § 402A(b) (1965).

259. *Id.*, cmt. p.

Unfortunately, the Act is not as clear as Section 402A as to the extent of liability of the nonmanufacturer seller and the manufacturer. The Act provides that "the manufacturer or seller" is not liable unless the plaintiff proves that the product was defective at the time that the product "left the control of the manufacturer or seller."²⁶⁰ The Act appears to draw a distinction between seller and manufacturer, though it does not define either term.²⁶¹ Other than for indemnity purposes,²⁶² the purpose of the distinction is not readily apparent. The Act's use of the conjunction "or" renders the meaning ambiguous. For example, one might conclude that the plaintiff may recover from either the manufacturer or the seller for a defect occurring while in the other's possession. Under this literal reading, the manufacturer could be held liable for defects occurring after the product left the manufacturer's control if the defect existed before the product left the hands of the retailer. Such an interpretation would expand manufacturer liability beyond that of prior law. No support exists in the academic literature or in judicial decisions for such a rule. The legislature did not likely intend this interpretation, nor is it likely that the courts would adopt such a view, although, the language could yield such an approach.

Because a literal interpretation would yield an unintended expansion of manufacturer liability, the court must seek an interpretation that will best yield a result consistent with the policies underlying the Act.²⁶³ Unfortunately, the Act leaves open a choice between two reasonable, but competing policies, either of which can be inferred from the Act. The court could choose to impose strict liability on the seller for all defects that occur upstream in the chain of distribution or while the product is under the seller's control, or the court could choose to impose liability solely on the basis of seller fault for design and warnings defects.

To recover from a seller in a design or warnings case, the plaintiff must prove both that the defect existed when the product left the control of the manufacturer or seller and that the manufacturer or seller knew or should have known of the danger.²⁶⁴ The court must decide whether the Act imposes liability in such a case based (1) only on seller fault or (2) based on either seller fault or seller vicarious liability for manufacturer fault. Under the former approach, the plaintiff must establish seller fault independently of the manufacturer fault.²⁶⁵ Under the latter approach the plaintiff can recover by establishing the fault of either the seller or the manufacturer.

The Act creates doubt because the use of the conjunction "or" implies equality of treatment as to the basis of liability for manufacturers and sellers. The lan-

260. MISS. CODE ANN. § 11-1-63(a) (Supp. 1996) (emphasis added).

261. See PART I, *supra* note 2, at 410-13 (discussing the term "manufacturer") and 414-20 (discussing the term "seller").

262. See MISS. CODE ANN. § 11-1-63(g) (Supp. 1996). See also *infra* text accompanying notes 324-26.

263. See *Evans v. Boyle Flying Serv., Inc.*, 680 So. 2d 821 (1996).

264. MISS. CODE ANN. § 11-1-63(c)(i), (f) (Supp. 1996).

265. Cf. H.R. 956, 104th Cong., 2d Sess. (1996) (Common Sense Product Liability Legal Reform Act of 1996) (vetoed by President Clinton, May 2, 1996) (providing that nonmanufacturer distributors of products are liable only if at fault or unless the manufacturer is not subject to the court's jurisdiction or a judgment against the manufacturer would be unenforceable).

guage pertaining to design and warnings defects can be reasonably read to require liability based only on the fault of the particular defendant against whom the plaintiff claims. Such a result would preserve the apparent equality of treatment implied by the language of the Act. A literal interpretation, as shown, would result in an unacceptably expanded liability for the manufacturer. On the other hand, imposing vicarious liability on the seller denies the seller the equality of treatment implied by the Act's language. The seller would have greater liability for exposure, being liable both for seller and manufacturer fault in design and warnings cases.²⁶⁶

From the retailer's point of view, the approach limiting retailer liability in design and warnings cases to retailer fault on the issue of knowledge of the danger is consistent with the purpose of protecting Mississippi businesses,²⁶⁷ of placing the liability on those who are most able to cope with the loss,²⁶⁸ and of placing liability on the person who is most likely to be at fault in creating the design or warning defect. Moreover, the restriction on strict liability also satisfies the view that moral considerations lead to regarding fault as the primary basis of liability in the tort system.²⁶⁹

On the other hand, the strict liability view imposing vicarious liability on retailers and wholesalers for the fault of manufacturers, is consistent with a policy of encouraging retailers and wholesalers to do business with reputable, careful, and financially answerable manufacturers,²⁷⁰ and of encouraging retailers and wholesalers to demand and expect manufacturers to exercise due care in the production of products.²⁷¹ Strict liability for sellers provides convenience to consumers in reaching a responsible party in the event the manufacturer is too remote,²⁷² and gives greater protection against financial loss to consumers caused by defective products.²⁷³ Strict liability for sellers allows the loss to fall on the innocent party who benefits from the sale of the defective product,²⁷⁴ and protects the general expectations of consumers regarding the safety and suitability of products that they purchase and use.²⁷⁵

Under a strict or vicarious liability approach to seller liability for defective design and warnings, the Act could be interpreted consistently with the approach

266. Under Section 402A, this problem does not exist because the term "seller" includes manufacturers and there is no ambiguity in the language. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. f (1965).

267. Large manufacturers are more likely to be out-of-state, while retailers are more likely to be located in Mississippi.

268. Manufacturers often have greater financial stature than locally owned and operated retailers.

269. See David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 453 (1993).

270. Sellers who are not at fault may seek indemnity from the manufacturer. See MISS. CODE ANN. § 11-1-63(g)(i) (Supp. 1996). Presumably, sellers are more likely to do business with manufacturers who are financially capable of indemnifying the seller than those who are not. Sellers also are more likely to buy from manufacturers who will exercise care in production of products to reduce the risk of product liability claims against the seller and manufacturer.

271. *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171 (Cal. 1964).

272. *Id.* See also, Marshall S. Shapo, *THE LAW OF PRODUCTS LIABILITY*, § 12.04[4] (3d ed. 1994).

273. Cf. *Birnbaum*, *supra* note 66, at 596 (1980).

274. *Id.*; *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113, 120 (Miss. 1966).

275. Cf. *Markle v. Mulholland's, Inc.*, 509 P.2d 529, 532-34 (Or. 1973); Twerski & Weinstein, *supra* note 57, at 231.

taken under Section 402A, meaning that a particular seller in the chain of distribution is liable for defects occurring upstream as well as those that occur while the product is in the possession of that seller.²⁷⁶ Thus, the manufacturer is liable only for deviation defects and breaches of express warranty existing in the product when it left the manufacturer's control and not those occurring subsequently in the chain of distribution. In contrast as to warnings and design defects under the Act, the manufacturer is liable for such defects only if the manufacturer was at fault.²⁷⁷ In deviation defect or express warranty cases, retailers are strictly liable for defects in the product that exist prior to the product leaving the retailer's control, regardless of retailer fault. However, in design and warnings cases, in order to hold the retailer liable, the plaintiff must show either that the manufacturer was at fault (thus, strict or vicarious liability for the retailer) or that the retailer was at fault. Arguably, this view is what the legislature most likely intended and represents an adoption of a view similar to the approach of Section 402A, thoroughly overruling the *Shainberg* Doctrine which protected retailers from strict liability in Mississippi.²⁷⁸

The indemnity provision of the Act allowing sellers to seek indemnity from manufacturers²⁷⁹ seems to support the view favoring expanded liability for sellers. One could argue that the existence of the indemnity provision implies an intent of the legislature to hold sellers vicariously liable for the defects created by the manufacturer. Since sellers are entitled to claim indemnity unless the seller is at fault,²⁸⁰ strict liability may be inferred in cases where the seller is not at fault and the plaintiff otherwise has a valid claim. Additional support for the view that the seller is strictly liable for any actionable defect created by the manufacturer may be found in the fact that no provision is made for the case where the manufacturer is not subject to the jurisdiction of a Mississippi court or is insolvent or where a judgment is not likely to be enforceable against the manufacturer. In the absence of strict liability under the Act for the seller in such circumstances, the plaintiff would be without a remedy for an otherwise actionable defect.²⁸¹ This reading is likely to be the reading adopted by the court if the court seeks to preserve greater rights of recovery for the injured plaintiff.

However, a close reading of the indemnity provision does not yield an unambiguous inference of strict liability for the nonmanufacturer sellers. One may read the indemnity provision consistently with a limited exposure for sellers. This provision may be read as setting forth a right of indemnity in design or warnings defect claims if the seller did not actually know of the danger, but

276. See also FINAL DRAFT, *supra* note 59, § 1.

277. See *supra* text accompanying notes 48-53, 57-86 (discussing foreseeability and alternative design requirements) and notes 196-204 (discussing fault in warnings).

278. Harges, *supra* note 47, at 765-69. See also PART I, *supra* note 2, at 420-22 for a discussion of the viability of the *Shainberg* Doctrine under the law prior to the Act.

279. MISS. CODE ANN. § 11-1-63(g)(i) (Supp. 1996).

280. *Id.*

281. Cf. MODEL ACT, *supra* note 113, § 105 (providing for non-manufacturer strict liability for defects when the manufacturer is outside the court's jurisdiction, is insolvent, or a judgment is likely to be unenforceable against the manufacturer); *but cf.* NEB. REV. STAT. § 25-21,181 (1995)(prohibiting strict liability claims in tort against non-manufacturer sellers and lessors).

should have known, and if the seller did not substantially control the design or production of the defective aspect of the product, make alterations or modifications in the product that were a substantial factor in causing the harm, or make express factual representations about the aspect of the product that caused the harm.²⁸² Thus, the seller who is only passively negligent as to knowledge of the danger may seek indemnity. Under this reading, if the seller did not know of the danger and had no reason to know of the danger, the plaintiff may not recover from the seller and the indemnity issue is moot. This reading is possible under the Act without doing harm to the language and is consistent with the view that sellers should not be strictly or vicariously liable in design and warnings cases.

In sum, the Act appears to impose strict liability on both sellers and manufacturers for deviation defects and breaches of express warranty or other express representations. The better view is that a defendant is liable for upstream deviation or misrepresentation defects and those that occur while the product is in that defendant's control. As to design and warnings defects, the more likely result is that the Act imposes strict liability on a seller for such defects that occur upstream in the chain of distribution or while under the seller's control. Manufacturers, however, are liable for such defects only if they are at fault with regard to knowledge of the danger.

IV. DEFENSES

The Act specifically provides that an open and obvious danger is a complete bar to a claim in defective warnings case,²⁸³ and that assumption of the risk is a complete bar in all claims under the Act.²⁸⁴ The Act also expressly preserves all common law defenses to a products liability claim.²⁸⁵ This section of the Article discusses the statutory and common law defenses.

A. Open and Obvious Defects or Dangers

The Act provides that in any claim of defective warnings or instructions, "the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious."²⁸⁶ Whether the danger is known or open and obvious is judged by a subjective standard — if the danger was known or perceived as open and obvious by the user or consumer.²⁸⁷ If the user or consumer did not actually know of the danger, knowledge of the danger or the obviousness of the danger is judged by an objective standard.²⁸⁸ In applying this objective standard, the trier of fact should take "into account the characteristics of, and the

282. MISS. CODE ANN. § 11-1-63(g)(1) (Supp. 1996).

283. MISS. CODE ANN. § 11-1-63(e) (Supp. 1996).

284. MISS. CODE ANN. § 11-1-63(d) (Supp. 1996).

285. MISS. CODE ANN. § 11-1-63(h) (Supp. 1996).

286. MISS. CODE ANN. § 11-1-63(e) (Supp. 1996).

287. *Id.* The Act provides in a warnings claim that the manufacturer or seller is not liable "if the danger posed by the product is known or is open and obvious to the user or consumer of the product . . ." *Id.*

288. *Id.* The Act provides that the manufacturer or seller is not liable if the danger "should have been known or open and obvious to the user or consumer . . ." *Id.*

ordinary knowledge common to, the persons who ordinarily use or consume the product.”²⁸⁹

The “open and obvious” defense as a complete defense in a warnings case does not appear to be a change in the law. Courts applying Mississippi law have consistently held that there is no need to warn of an open and obvious defect.²⁹⁰ Since the adoption of a risk-utility analysis making the open and obvious nature of a defect only one factor in evaluating whether a product is unreasonably dangerous, the Mississippi Supreme Court has not dealt with whether an open or obvious danger will defeat a warnings claim. Nevertheless, the court likely would not have abrogated the open and obvious danger defense in warnings cases arising under pre-Act law. The lack of warnings of an open and obvious danger plays no causal role in the harm. As noted in the comments to the Final Draft, “[w]arning of an obvious or generally known risk in most instances will not provide an additional measure of safety.”²⁹¹ Thus, even under a risk-utility analysis, no warning of an open and obvious danger should be required.

With respect to open and obvious dangers in other contexts, such as deviation defect, design defect, and warranty cases, the effect of an open and obvious danger is not as clearly addressed by the Act. Perhaps only in deviation defects will an open and obvious danger not bar recovery totally.²⁹² In warranty cases, the reliance on the express warranty or factual representation must be justifiable.²⁹³ If a danger inconsistent with the warranty or representation is known or open and obvious, one may well conclude that the reliance was not reasonable or justifiable, barring the plaintiff’s recovery. In design cases, the plaintiff must show that the product “failed to function as expected.”²⁹⁴ In such cases, if a danger is open and obvious, the fact that the product caused an injury as a result of the open and obvious danger may well defeat the plaintiff’s claim.²⁹⁵ However, plaintiff’s loss will not come as a result of an affirmative defense but because the plaintiff failed to prove all the elements of her claim.

In dicta, courts have pointed out that the Act re-established the open and obvious danger doctrine in warnings cases.²⁹⁶ In *Seymour v. Brunswick*,²⁹⁷ the supreme court stated that the open and obvious defense under the Act is only applicable in warnings cases.²⁹⁸ Technically the court is correct; the open and

289. *Id.*

290. See *supra* text accompanying notes 205-06. See also *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894 n.2 (Miss. 1995) (indicating that the open and obvious defense is “inherently applicable” to warnings and instructions cases).

291. FINAL DRAFT, *supra* note 59, § 2 cmt. i.

292. In the context of deviation defects, the statute is silent as to the effect of open and obvious dangers. Presumably the common law will govern any defenses in this regard. The supreme court has abolished the defense as a complete bar at common law. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss. 1994).

293. MISS. CODE ANN. § 11-1-63(a)(i)4 (Supp. 1996).

294. MISS. CODE ANN. § 11-1-63(f)(ii) (Supp. 1996).

295. See *supra* text accompanying notes 94-114.

296. *Satcher v. Honda Motor Co., Ltd.*, 855 F. Supp. 886, 890 (S.D. Miss. 1994), *cert. denied*, 116 S. Ct. 705 (1996); *Batts v. Tow-Lift Forklift Co.*, 153 F.R.D. 103, 107 (N.D. Miss. 1994), *rev'd on other grounds*, 66 F.3d 743 (5th Cir. 1995); *Materials Transp. Co. v. Newman*, 656 So. 2d 1199, 1203 (Miss. 1995); *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894 (Miss. 1995).

297. 655 So. 2d 892 (Miss. 1995).

obvious defense as an affirmative defense is applicable only in such cases because the defense must raise the issue and prove the point.

The specific inclusion of the "open and obvious" defense for warnings cases may be somewhat superfluous because the plaintiff bears the burden of proving that the danger was one that the ordinary user or consumer would not realize.²⁹⁹ Despite the recognition of an open and obvious danger as a defense by the Act, the burden has actually been shifted to the plaintiff to disprove that the product had a danger that was open and obvious. Only in cases where the defense contends that the plaintiff subjectively knew of the danger does the defendant truly bear the burden of proof.

In stating that the Act restores the open and obvious defense only in warnings cases, the courts have apparently overlooked, and not yet addressed, the issue of the plaintiff's burden of proof in design and breach of warranty cases. In proving that the product was defectively designed, the requirement that the plaintiff must prove that the product failed to function as expected, as a corollary appears to require the plaintiff to show that the defect was not open and obvious.³⁰⁰ Similarly, in breach of warranty cases, the plaintiff must prove reasonable reliance. The court may well determine that reliance is unreasonable as a matter of law when the defect is known or obvious. While the courts correctly state that the open and obvious defense does not apply in cases other than warnings cases to bar recovery, the burden is on the plaintiff to prove the defects claimed were not open and obvious in design and warranty cases.³⁰¹ A defendant well may introduce evidence to rebut the plaintiff's evidence that the alleged defect was not open and obvious, but the burden of proof remains with the plaintiff.

Under the Act, the open and obvious defense is not a true affirmative defense, except in deviation cases or in cases where the plaintiff subjectively knows of the danger in a warnings case. A true affirmative defense is one that defeats the plaintiff's claim despite the fact that the plaintiff has met her burden of proof.³⁰² In design cases, warnings cases where the danger is measured objectively, and warranty cases, evidence offered by the defense as to the plaintiff's knowledge or the obviousness of the defect serves to rebut the plaintiff's proof of defect rather than to defeat the claim despite the plaintiff having met all of her elements of proof.

298. *Id.* at 894.

299. MISS. CODE ANN. § 11-1-63(c)(i) (Supp. 1996). See *supra* text accompanying notes 212-15.

300. See *supra* text accompanying notes 95-115.

301. Even under the former consumer expectations approach, the issue is not whether open and obvious danger is an affirmative defense; rather it is whether the plaintiff proved that the product failed to function as expected. The abolition of the open and obvious defense as a bar in design cases actually is a lessening of the plaintiff's burden in proving that the product was unreasonably dangerous. Under the former approach, the plaintiff need not show, as a required element, that the product failed to function as expected. Such evidence would be a factor to consider in evaluating whether the design is unreasonably dangerous. However, to reduce the plaintiff's recovery, the defendant would be required to plead the plaintiff's contributory negligence in proceeding to use the product in light of the known or obvious danger.

302. For example, a statute of limitations defense is an affirmative defense because it must be pleaded and proved by the defendant and is effective despite the plaintiff's successful proof of defendant's fault.

B. Assumption of Risk

The Act makes assumption of risk a complete defense to any products liability claim. To establish the defense under the Act, the defendant³⁰³ must show that the claimant "(i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition."³⁰⁴ The elements of the defense prescribed are taken nearly verbatim from Mississippi case law.³⁰⁵

The continued viability of assumption of risk as a separate defense from contributory negligence or fault has been in serious doubt for some time.³⁰⁶ A plurality of the court has indicated that the doctrine of assumption of the risk should be abolished and absorbed into Mississippi comparative negligence rules.³⁰⁷ Nevertheless, at least in products liability claims, assumption of risk as a complete bar is alive and well in Mississippi. The defense retains vitality in circumstances in which contributory negligence might not apply.³⁰⁸

The Mississippi Supreme Court has held that in cases where contributory negligence doctrine and assumption of risk doctrine overlap, the rules of contributory, hence comparative, negligence control.³⁰⁹ The court has applied this approach to situations in which the evidence showed that the plaintiff arguably was merely careless as opposed to venturous,³¹⁰ or in which the plaintiff was aware of general risk, but not the specific risk.³¹¹ As the court has recognized, the assumption of risk defense simply should not apply to cases of plaintiff's mere carelessness or knowledge of a general danger.³¹² However, in cases where the plaintiff has specific knowledge of the danger, appreciates the danger, and voluntarily encounters it, the defense should apply. Nevertheless the court only rarely has found that the

303. The Act does not expressly place the burden on the defendant to prove assumption of risk, but the better reading of the Act leads to that conclusion.

304. MISS. CODE ANN. § 11-1-63(d) (Supp. 1996).

305. *Yarbrough v. Phipps*, 285 So. 2d 788, 791 (Miss. 1973) ("Three elements of inquiry, which must be pointed out to the jury in an assumption of risk instruction, are whether: (1) the injured party has *knowledge* of the condition inconsistent with her safety; (2) the injured party *appreciated* the danger in the condition; and (3) the injured party *deliberately* and *voluntarily* chose to expose herself to that danger in such a manner as to register *assent* on the continuance of the dangerous situation.").

306. See Olger C. Twyner, III, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L.J. 563, 574-79 (1982).

307. *Horton v. American Tobacco Co.*, 667 So. 2d 1289, 1306 (Miss. 1995).

308. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 495 (5th ed. 1984) ("The plaintiff may assume the risk where the conduct of defendant is willful, wanton, or reckless, where his ordinary negligence is no defense . . .").

309. *Braswell v. Economy Supply Co.*, 281 So. 2d 669, 677 (1973). See Twyner, *supra* note 306, at 577-78 (criticizing the rule as unnecessary). The overlap of assumption of risk with contributory negligence occurs when the plaintiff's voluntary choice and voluntarily encountering of a risk is unreasonable. KEETON ET AL., *supra* note 308, § 68, at 481.

310. *E.g.*, *Huffman v. Walker Jones Equip. Co.*, 658 So. 2d 871, 874 (Miss. 1995).

311. *Id.* (Plaintiff testified that she was aware of the risk of climbing on an unstable scaffold, but it did not occur to her that there was a risk that someone on the scaffold would drop something on her head while she was standing by the scaffold.). In general, the cases in which the court has found an "overlap" tend to be cases where assumption of risk may not have been applicable if properly understood.

312. *Id.* at 873.

assumption of risk defense applies.³¹³ In this respect, the Act is unlikely to change the notion of assumption of risk except to reinforce its recognition as a defense apart from contributory negligence.

The significance of assumption of risk as a defense may be found in cases where the product arguably failed to function as expected, if this expectation is measured objectively,³¹⁴ and the danger was nevertheless actually known to the user or consumer. The defense may also be significant in deviation defect cases because an open and obvious danger does not completely bar recovery, but a subjective assumption of risk is a complete bar.

The court in recent years has attempted to restrict and narrow the assumption of risk defense.³¹⁵ The most recent example is the case of *Wilks v. American Tobacco Company*.³¹⁶ In *Wilks*, the court held that a defendant may not raise the defense of assumption of risk where the defense does not admit that the product posed a risk.³¹⁷ This opinion appears to seriously restrict the ability of defendants to raise the defense because the defendant cannot both deny the risk and alternatively assert that if a risk did exist, the plaintiff assumed that risk. If a defendant chooses to oppose the plaintiff's assertion that a risk existed, *Wilks* appears to foreclose use of the assumption of the risk defense, even if the plaintiff succeeds in proving that the risk did exist.

Whether the use of assumption of the risk will be similarly restricted under the Act remains to be seen. Nothing in the Act's language seems to require the defendant to admit that an unsafe condition existed in the product before the defense can be raised. Indeed, if the plaintiff can succeed in proving that an unsafe condition existed in the product, no logical reason exists to bar the defendant from showing that the plaintiff knew of the condition and appreciated the danger. A denial of the existence of the danger in the first place should not bar proof of the plaintiff's knowledge if the plaintiff has shown that the danger existed. For example, assume that the parties dispute whether the brakes on plaintiff's new car were mismanufactured. If plaintiff proves that the brakes were mismanufactured and unreasonably dangerous, there is no reason to prohibit the manufacturer who disputes the plaintiff's claim from showing that the plaintiff knew of the defect, knew of and appreciated the danger, and voluntarily chose to drive anyway. If the plaintiff admits that she voluntarily drove the car knowing that the brakes were in a dangerous condition, the defendant should be able to raise the defense despite the denial that the defect actually existed.

313. *Yarbrough v. Phipps*, 285 So. 2d 788, 790 (Miss. 1973). For an excellent discussion of the application of the assumption of risk doctrine in Mississippi, see *Richardson v. Clayton & Lambert Manufacturing Co.*, 657 F. Supp. 751 (N.D. Miss. 1987).

314. See *supra* text accompanying notes 76-85.

315. See *Twynner*, *supra* note 306, at 576.

316. 680 So. 2d 839 (Miss. 1996).

317. *Id.* at 843.

C. Other Defenses

The Act expressly retains other common law defenses to an action for damages caused by a product.³¹⁸ Among these defenses are misuse, alteration, and other intervening, superceding causes. Under the common law of Mississippi, unforeseeable misuse of a product is an absolute bar to a plaintiff's claim.³¹⁹ A substantial alteration has been recognized as a bar to recovery, as well.³²⁰ In any event, however, the plaintiff bears the burden of proving that the defect existed at the time the product left the control of the manufacturer or seller.³²¹ Proof of alteration amounts to showing that the plaintiff has not sustained her burden of proof as to the time of the defect's existence. In addition, the court has recognized that the intervening conduct of a third person may amount to a superceding cause sufficient to break the chain of causation.³²²

Contributory negligence is also available as a defense to reduce the plaintiff's recovery in a negligence claim.³²³ Contributory negligence is likely to be an affirmative defense under the Act as well.³²⁴ The fact that the Act contains both strict liability aspects and negligence aspects supports application of contributory negligence to reduce the plaintiff's recovery in a claim under the Act. The Mississippi Supreme Court has not expressly held that contributory negligence is applicable in a strict liability claim, but its applicability has been assumed.³²⁵

V. INDEMNITY, JOINT AND SEVERAL LIABILITY, AND CONTRIBUTION

The Act expressly provides the nonmanufacturer seller who is liable to a claimant under the Act with a right of indemnity against a manufacturer who is also found liable for damages caused by a defective product.³²⁶ The right of indemnity includes recovery for litigation costs, reasonable expenses, reasonable attorney's fees, and any damages awarded by the trier of fact.³²⁷ The Act, however, limits the right of indemnity to cases where the seller played a passive role with respect to the creation of or knowledge of the defect. Thus, the seller is not entitled to indemnification if the seller exercised "substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product"; if the seller altered or modified the product in a manner that was a substantial factor in causing the harm; if the seller had actual knowledge of the defect at the

318. MISS. CODE ANN. § 11-1-63(h) (Supp. 1996).

319. *Ford Motor Co. v. Matthews*, 291 So. 2d 169, 174 (Miss. 1974). *See also* *Whittle v. City of Meridian*, 530 So. 2d 1341, 1347 (Miss. 1988).

320. *Whittle*, 530 So. 2d at 1347.

321. MISS. CODE ANN. § 11-1-63(a) (Supp. 1996).

322. *Whittle*, 530 So. 2d at 1347; *E.I. DuPont DeNemours & Co. v. Ladner*, 73 So. 2d 249, 255-56 (Miss. 1954).

323. MISS. CODE ANN. § 11-7-15 (1972).

324. *See* Harges, *supra* note 47, at 752 (arguing that the Comparative Fault Statute is sufficiently broad to apply to products liability claims).

325. *See* *Horton v. American Tobacco Co.*, 667 So. 2d 1289, 1292-93 (Miss. 1995) (plurality opinion discussing plaintiff's contributory negligence in regard to a claim that cigarettes were unreasonably dangerous).

326. MISS. CODE ANN. § 11-1-63(g)(i) (Supp. 1996).

327. *Id.* Presumably the damages are the damages awarded to the party injured by the product.

time of supplying the product; or if the seller made express factual representations about that aspect of the product that caused the harm.³²⁸

The Mississippi Supreme Court has not issued any reported opinions dealing with nonmanufacturer seller indemnity claims. However, to the extent that the *Shainberg Doctrine*³²⁹ was discarded by the court prior to the Act, indemnity claims prior to the Act would not have looked substantially different. In *Bush v. City of Laurel*,³³⁰ the court stated that an indemnity obligation may arise from “a contractual relation, from an implied contractual relation, or out of liability imposed by law.”³³¹ In general, a party who did not create the dangerous situation, who is only passively negligent, or who is liable only because of a non-delegable statutory duty may be entitled to indemnity from the active wrongdoer.³³² In a common law indemnity action, the indemnitee may recover reasonable attorney’s fees, reasonable expenses, including court costs and interest, and the amount paid to the claimant.³³³

In delinuating seller conduct that bars an indemnity claim, the Act includes “express factual representation[s] about the . . . product which caused the harm for which recovery of damages is sought.”³³⁴ To the extent that such representations are in addition to, vary from, or alter representations made by the seller, such a rule is proper. However, the language could be interpreted to mean that even in cases where a seller makes a factual representation in reliance on the same or substantially similar representations made by the manufacturer, the seller may not recover indemnity. If applied to this extent, the rule would be unduly harsh. When making a representation that is the same as that of the manufacturer and in reliance on information or representations made by the manufacturer, the seller should be entitled to indemnity.

A problem related to indemnity may occur in the intersection, if any, between the statute regulating joint and several liability and apportionment of fault among co-tortfeasors³³⁵ and the Act. Is either the manufacturer or the seller jointly and several liable with the other for the full amount or only to the extent necessary for the plaintiff to recover fifty percent of her damages?³³⁶ The statute setting forth the rules of joint and several liability for tort claims does not expressly exclude products liability claims. The statute does, however, expressly treat employer-employee defendants and principal-agent defendants as one person for apportionment purposes.³³⁷ At least one commentator has concluded that the statute includes “common duty cases because the definition of fault in subsection (1) is sufficiently broad to do so, and the exclusions from the statute in subsec-

328. *Id.*

329. See PART I, *supra* note 2, at 420-22.

330. 215 So. 2d 256 (Miss. 1968).

331. *Id.* at 259.

332. *Id.* at 260.

333. *Id.* at 259-60.

334. MISS. CODE ANN. § 11-1-63(g)(i) (Supp. 1996).

335. MISS. CODE ANN. § 85-5-7 (1973).

336. *Id.*

337. MISS. CODE ANN. § 85-5-7(3) (1973).

tion (6) do not cover this situation.”³³⁸ Presumably, the common duties of manufacturers and sellers would be among those common duty cases covered by the statute.

If the statutory rules governing joint and several liability in tort claims govern product liability claims, the plaintiff may not be entitled to a full recovery from a seller unless the seller is one hundred percent at fault. In other cases, the seller would be entitled to apportionment, and the joint and several liability would be limited to fifty percent of the plaintiff's recoverable damages. In the case where the seller is not at fault, the seller would be entitled to recover indemnity under the Act from the manufacturer whatever the seller was condemned to pay in damages, presumably an amount no more than fifty percent of the plaintiff's harm. In a case where both the seller and the manufacturer were at fault, such as where each knew or should have known of the danger in a warnings case, joint and several liability would be limited under the joint and several liability statute to fifty percent of the plaintiff's recoverable damages with several liability for the remainder as apportioned by the fact finder. If both manufacturer and seller are parties in such a claim, contribution would be available between them. If one is not a party to the plaintiff's claim, the answer is not clear as to a right of contribution.³³⁹

In order to assert a claim for indemnification, the seller must give notice of the suit within thirty days of the filing of the complaint against the seller.³⁴⁰ The notice rule is unduly harsh and may lead to unreasonable denial of claims for indemnity. Requiring reasonable notice of an indemnity claim is proper in order to protect the rights of the manufacturer. However, the requirement of notice within thirty days of filing may well exclude many otherwise legitimate indemnity claims. In cases where service of process is delayed more than thirty days from filing and the seller is unaware of the suit, the seller will be unable to make an indemnity claim, even if he gives as prompt a notice as possible. Manufacturers stand to unjustly benefit from retailers and wholesalers by an unreasonable time bar to indemnity claims. A better rule would require prompt notice after service of process or actual notice of the suit.

VI. CONCLUSION

The Mississippi Products Liability Act of 1993 is an act that is flawed and in need of careful revision. Despite its proponents' stated purpose to bring stability and certainty to the law, to improve the climate for Mississippi business, and to bring fairness to products liability law, it may well have done the opposite. Its meaning is uncertain and vague throughout, from its lack of definitions to the tests of design defect to the liability of non-manufacturer sellers and their indemnity rights. The Act may well deprive deserving claimants of remedies traditionally granted under tort law.

338. H. Wesley Williams, III, Comment, 1989 Tort "Reform" in Mississippi: *Modification of Joint and Several Liability and the Adoption of Comparative Contribution*, 13 Miss. C. L. Rev. 133, 154-55 (1992).

339. *Id.* at 168.

340. MISS. CODE ANN. § 11-1-63(g)(ii) (Supp. 1996).

Neither plaintiffs nor defendants can know with any degree of confidence what the Act does or what the legislature intended. Businesses and consumers are left without clear guidance as to their duties and rights. They are left without legislative revision, to face what may be years of uncertainty and confusion. Litigation costs are likely to increase, rather than decrease, because of the necessity of trial motions and briefs debating the application of the Act as well as appeals to obtain authoritative interpretations of the Act.

The movement of the Act toward negligence for design and warnings cases, while retaining strict liability in deviation defect and express warranty cases, is well within the national trends and in keeping with the recommendations of most scholars in the field. Thus, the basic structure or policy of the Act is sound. Nevertheless, the Act is in need of careful revision in order to accomplish the goals of certainty and fairness. The Act should state clearly whether it is intended to provide a unified theory of liability. It should define clearly its terms. The scope of coverage should be clearly delineated, including the status of used products and non-seller commercial distributors. Bystanders should be protected under the Act. Property interests should be expressly protected as well as persons. Purely economic interests should be handled fairly, whether under the Act or by traditional implied warranties. The test for defective design should eliminate language that would support an open and obvious defense as a complete bar to recovery. The indemnity provision should contain a fairer notice requirement. The liability of non-manufacturer sellers should be expressly detailed. The people and businesses of Mississippi deserve clear and fair laws. The current Act is neither clear nor fair as written.

